TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 629

THE UNITED STATES OF AMERICA, APPELLANT

vs.

PHILIP LEPOWITCH AND MARVIN SPECTOR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

FILED JANUARY 6, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 629

THE UNITED STATES OF AMERICA, APPELLANT

vs.

PHILIP LEPOWITCH AND MARVIN SPECTOR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

INDEX

511209—43

1 [Citation in usual form showing service on Henry S. Janan, filed Nov. 27, 1942, omitted in printing.]

8 In United States District Court Eastern District of Missouri, Eastern Division

Record entry as to filing of indictment

September 18, 1942

In re Grand Jury

The Grand Jurors of the United States in and for the Eastern Judicial District of Missouri, heretofore empaneled, sworn and charged at the present March 1942 Term of this District Court, this day return into Court the following numbered indictments, viz: Nos. 22978 to 23114, both inclusive, which said indictments are duly received by the Court, ordered filed and *filed and* each of said indictments being endorsed "A True Bill by Jno. S. Wood, Foreman" and each of said indictments being filed and numbered by the Clerk as follows:

Included among the indictments filed is No. 23034, United States of America vs. Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker.

And now the Grand Jury advising the Court through their Foreman that they have no further business before them and having completed investigation of the matters presented to them as such Grand Jurors, and the United States Attorney likewise advising the Court that he knows of no further matters to be presented to said Grand Jurors, the Court doth thereupon order that the said Grand Jurors be and they are finally excused from further attendance as such Grand Jurors for the March Term, A. D. 1942 of this Court.

9 In United States District Court, Eastern Division of the Eastern Judicial District of Missouri

23034

Indictment

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, at the March Term thereof, A. D. 1942.

The Grand Jurors for the United States of America, duly empaneled, sworn and charged in and for the District Court of the United States, within and for the Eastern Judicial District of

Missouri, and inquiring in and for said Judicial District, at the March Term, A. D. 1942, of the Eastern Division of said Judicial District, upon their oaths present and charge:

That on or about the 1st day of September A. D. 1942, at the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker, hereinafter referred to as the defendants, with intent to defraud one Mrs. Adele Silk, did then and there unlawfully, knowingly, falsely, and feloniously assume and pretend to be officers and employees acting under the authority of the United States, to wit, agents of the Federal Bureau of Investigation, and did then and there falsely take upon themselves to act as such by then and there in said pretended capacity, demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one Abe Zaidman; they, the said defendants not being then and there officers or employees acting under the authority of the United States, or of any department thereof, as they, the said defendants, then and there well knew;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

18 USC 76.

F nm 1000 or I nm 3 y or b.

SECOND COUNT

The Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge:

That on or about the 1st day of September A. D. 1942, at the City of St. Louis, in the States of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker, hereinafter referred to as the defendants, with intent to defraud one Mrs. Adele Silk, did then and there unlawfully, knowingly, falsely, and feloniously assume and pretend to be officers and employees acting under the authority of the United States, to wit, agents of the Federal Bureau of Investigation, and in such pretended character did demand from the said Mrs. Adele Silk a valuable thing, to wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman; they, the said

defendants, not being then and there officers or employees acting under the authority of the United States, or of any department thereof, as they, the said defendants, then and there well knew;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

18 USC 76.

F nm 1000 or I nm 3 y or b.

(Signed) HARRY C. BLANTON,
United States Attorney.

11 [Indictment:] Violation of Sec. 76, Title 18, U. S. C. A true bill, Jno. S. Wood, Foreman. Filed in open court this — day of Sept. 18, 1942. James J. O'Connor, Clerk. Harry C. Blanton, United States Attorney.

12 In United States District Court

Record entry as to filing of joint demurrer, and order and judgment sustaining same

October 26, 1942

This day comes the United States of America, appearing by the United States Attorney, and come also the defendants, Philip Lepowitch, alias Phil Stewart; and Marvin Spector, alias Louis Baker, appearing by counsel; whereupon said defendants file herein their joint demurrer to each of Counts one and two of the Indictment in this cause, which said demurrer is argued before and submitted to the Court; and the Court, after due consideration of the same, doth Order that said demurrer be and the same is sustained as to each of said defendants in accordance with memorandum opinion this day filed.

And it is further ordered and adjudged, pursuant to the finding of the Court as aforesaid, that the Indictment herein be and the same is dismissed as to each of the said defendants, Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker.

13 In United States District Court in and for the Eastern District of the Eastern Judicial Division of Missouri
No. 23034—Div. No. 2

THE UNITED STATES OF AMERICA, PLAINTIFF
vs.
PHILIP LEPOWITCH, ALIAS PHIL STEWART, AND MARVIN SPECTOR, ALIAS LOUIS BAKER, DEFENDANTS

Joint demurrer of defendants to indictment

Filed October 26, 1942

Comes now Philip Lepowitch and Marvin Spector, defendants in the above-entitled action, and demur to each and every Count of the Indictment herein, and as grounds therefor, respectfully represents that:

1. Count One of the Indictment fails to state facts sufficient to charge defendants with the commission of a criminal offense against the United States of America.

2. Count Two of the Indictment fails to state facts sufficient to charge defendants with the commission of a criminal offense against the United States of America.

Wherefore, defendants pray an order of this Court sustaining their joint demurrer to each and every count of the Indictment.

s HENRY S. JANON,
Attorney for Defendants.

14 In the United States District Court, Eastern District of Missouri, Eastern Division

No. 23034

UNITED STATES OF AMERICA, PLAINTIFF
v.
PHILIP LEPOWITCH, ALIAS PHIL STEWART, AND MARVIN SPECTOR, ALIAS LOUIS BAKER, DEFENDANTS

Opinion

Filed October 26, 1942

This matter comes on for determination under a joint demurrer to the indictment filed on behalf of the defendants. The grand jury has returned an indictment in which the defendants are

charged with violating Section 76, Title 18, United States Code, wherein it is alleged that the defendants falsely assumed and pretended to be agents of the Federal Bureau of Investigation. The indictment is so drawn as to be intended to reach both features of the statute—namely, count one is drawn under the phraseology of the statute covering the activities of one who falsely, in the pretended capacity, takes upon himself to act as such, while count two of the indictment covers the other feature of the statute wherein one in such false and assumed character demands from another a valuable thing.

In the first count the indictment alleges that the defendants did falsely take upon themselves to act in the capacity of agents of the Federal Bureau of Investigation by "demanding of and from the said Mrs. Adele Silk that she give the defendants
15 information of and concerning the whereabouts of Abe Zaidman." The second count alleges that defendants in their pretended character "did demand from the said Mrs. Adele Silk a valuable thing, to-wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman."

The demurrer is based upon one ground only—namely, that the indictment fails to state facts sufficient to charge defendants with a commission of a criminal offense against the United States of America.

The validity of Section 76, Title 18, United States Code, is not raised by the demurrer, and accordingly there is no constitutional question involved. We are concerned here only with the one feature, that of determining whether the indictment pleads facts sufficient to constitute an offense within the terms of the statute. The language of the statute is fairly clear to the extent that intent to defraud either the United States or any person is a necessary element of the offense, coupled with falsely assuming or pretending to be an officer or employee acting under the authority of the United States or some department thereof, or a corporation owned or controlled by the United States. Present these two conditions the statute may be violated in either of two ways condemned as illegal. First, by one taking upon himself to act in the falsely pretended character, or secondly by demanding or obtaining from any person or from the United States "any money, papers, document, or other valuable thing." Hence, the demurrer here raises the issue as to whether the defendants in falsely pretending to be agents of the Federal Bureau of Investigation and demanding of Mrs. Silk that she give the defendants information concern-
16 ing the whereabouts of one Abe Zaidman constitutes on the one hand taking upon themselves to act as Federal Bureau of

Investigation agents, or on the other hand constitutes demanding of Mrs. Silk "a valuable thing" within the meaning of the statute.

It is my view that the action of these defendants, while highly reprehensible, does not come within the terms of the statute. The action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not in my opinion taking upon themselves to act as Federal Bureau of Investigation agents, nor was the information demanded by them "a valuable thing" within the meaning of the statute. It follows that the demurrer to the indictment should be sustained.

It is so ordered.

(S) GEO. H. MOORE,
United States District Judge.

Dated at St. Louis, Missouri, this 26th day of October A. D. 1942.

17 In United States District Court

Record entry of filing of plaintiff's petition for appeal, assignments of error and jurisdictional statement

November 25, 1942

This day comes the United States of America, appearing by the United States Attorney, and files and presents to the Court its petition praying for the allowance of an Appeal to the United States Supreme Court from the order and judgment entered in this cause sustaining the joint demurrer by the defendants to the indictment in this cause and dismissing said indictment, together with its Assignments of Error on such proposed appeal and Statement as to Jurisdiction pursuant to Rule 12 of the United States Supreme Court;

Whereupon the Court, in order filed and entered herein this day, doth allow said appeal as prayed for and directs the issuance of a citation directed to defendants.

18 In United States District Court

[Title omitted.]

Petition for appeal

Filed November 25, 1942

Comes now the United States of America, plaintiff herein, and states that, on the 26th day of October, 1942, the District Court

of the United States for the Eastern District of Missouri, Eastern Division, sustained a demurrer to Counts 1 and 2 of the indictment herein, and the United States of America; feeling aggrieved at the ruling of said District Court in sustaining said demurrer, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
HARRY C. BLANTON,
United States Attorney,
Eastern District of Missouri.

19 In United States District Court

[Title omitted.]

Assignments of error

Filed November 25, 1942

Comes now the United States of America, by Harry C. Blanton, United States Attorney for the Eastern District of Missouri, and avers that in the record, proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

I. That the Court erred in sustaining as to Counts 1 and 2 the demurrer to the indictment.

II. That the Court erred in holding that "the action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not * * * taking upon themselves to act as Federal Bureau of Investigation agents * * *" within the meaning of Section 32 of the Criminal Code (18 U. S. C. 76), upon which Count 1 of the indictment was predicated.

III. That the Court erred in holding that "the information demanded by" the defendants was not "'a valuable thing' within the meaning of" section 32 of the Criminal Code (18 U. S. C. 76), upon which Count 2 of the indictment was predicated.

HARRY C. BLANTON,
United States Attorney,
Eastern District of Missouri.

20 In United States District Court

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed November 25, 1942

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment in this cause sustaining a demurrer by the defendants to Counts 1 and 2 of the indictment in said cause, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered such petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court ordered and judged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court in sustaining the demurrer of the defendants to the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further ordered that the United States of America be, and it is hereby, permitted a period of forty (40) days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at St. Louis, Missouri this 25th day of November, 1942.

By the Court:

GEO. H. MOORE,
United States District Judge.

21 In United States District Court

Record entry of issuance of citation and filing of return; filing of praecipe and return as to service in compliance with provisions of Supreme Court rule.

November 27, 1942

This day citation on the appeal heretofore allowed plaintiff from judgment entered sustaining demurrer of defendants to indictment herein and dismissing said Indictment, is signed by the Court and issued directed to the defendants herein citing and admonishing them to be and appear at and before the Supreme

Court of the United States at Washington, D. C., within forty (40) days from and after this date, which citation is acknowledged by attorney for appellees, and filed.

And now plaintiff files herein its praecipe for transcript of record on said appeal to the United States Supreme Court, together with plaintiff's notice to defendants, bearing endorsed thereon, acknowledgment thereof, by counsel of defendants of service of petition for appeal, assignments of error, order allowing appeal and Statement of Jurisdiction, as provided by Rule 12, Section 2 of the Supreme Court Rules, as well as directing attention of defendants to certain provisions of said Rule.

23 In United States District Court

Praecipe for transcript of record

Filed November 27, 1942

To the CLERK, *United States District Court for the Eastern District of Missouri:*

The appellant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the Eastern District of Missouri, in connection with its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of indictment, filing of demurrer and entry of order and judgment sustaining demurrer.
2. Indictment.
3. Demurrer.
4. Opinion sustaining demurrer.
5. Petition for appeal to the Supreme Court.
6. Statement of jurisdiction of the Supreme Court.
7. Assignment of error.
8. Order allowing appeal.
9. Notice of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement as to jurisdiction.
10. Citation.

Praecipe.

HARRY C. BLANTON,
United States Attorney,
Eastern District of Missouri.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 27th day of November 1942.

HENRY S. JANON,
Counsel for Appellees.

24 [Clerk's certificate to foregoing transcript omitted in printing.]

25 In the Supreme Court of the United States

October Term, 1942

No. 629

Statement of points to be relied upon and designation of record

Filed January 13, 1943

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service of the above Statement of Points and Designation of Record acknowledged this 9th day of January 1943.

HENRY S. JANON,
Counsel for Appellees.

[File endorsement omitted.]

26 Supreme Court of the United States

No. 629—October Term, 1942

Order noting probable jurisdiction

February 1, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] File No. 47130. D. C. U. S., E. Missouri. Term No. 629. The United States of America, Appellant *vs.* Philip Lepowitch and Marvin Spector. Filed January 6, 1943. Term No. 629 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE 1943

FILE COPY

No. 629

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

PHILIP LEBOWITCH AND MARVIN SPECTOR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

In the United States District Court, Eastern District of Missouri, Eastern Division

No. 23034

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP LEPOWITCH, ALIAS PHIL STEWART, AND MARVIN SPECTOR, ALIAS LOUIS BAKER, DEFENDANTS

STATEMENT AS TO JURISDICTION

(Filed November 25, 1942)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on October 26, 1942. Petition for appeal was filed on November 25, 1942, and is presented to the District Court herewith, to wit, on the 25th day of November 1942.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in

505456—43

this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by 28 U. S. C. 345.

STATUTE INVOLVED

Section 32 of the Criminal Code, as amended (18 U. S. C. 76) provides:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

THE ISSUES AND THE RULING BELOW

A two-count indictment was returned at the March 1942 term of the Grand Jury. Defendants filed a joint demurrer which, as the District Court indicated in its opinion, presents only the ques-

tion "whether the indictment pleads facts sufficient to constitute an offense within the terms of the statute."

Count One is drawn to charge an offense within the first interdiction of the statute. Thus it alleges that defendants, with the intent to defraud one Mrs. Adele Silk, falsely pretended to be Agents of the Federal Bureau of Investigation and did falsely take upon themselves to act as such "by then and there in said pretended capacity, demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one Abe Zaidman * * *." In sustaining the demurrer to this count the District Court held that "the action of the defendants, in their false and pretended character of Federal Bureau of Investigation Agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not * * * taking upon themselves to act as Federal Bureau of Investigation Agents * * *."

Count Two is drawn to charge an offense within the second interdiction of the statute. Thus it alleges that defendants, with intent to defraud Mrs. Silk, falsely pretended to be Federal Bureau of Investigation Agents and in such pretended character "did demand from the said Mrs. Silk a valuable thing, to-wit, demand that she, the said Mrs. Adele Silk, then and there give to them,

the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman; * * *." As to this count, the District Court held that the information demanded by the defendants was not "'a valuable thing' within the meaning of the statute."

Inasmuch as the District Court related that the facts alleged did not fall within the condemnation of the statute, the Court construed the statute, and the ruling is subject to review by the Supreme Court. *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Stevenson*, 215 U. S. 190, 194–195; *United States* v. *Kapp*, 302 U. S. 214, 217.

THE QUESTIONS ARE SUBSTANTIAL.

The questions involved are substantial and of public importance, for the narrow construction of Section 32 embodied in the District Court's ruling would permit wholesale impersonations of Federal officers, thus rendering the statute ineffective "to maintain the general good repute and dignity of the service itself," which is its principal object. *United States* v. *Barnow*, 239 U. S. 74, 80.

1. Under the first interdiction of the statute, all that is required, in addition to the fraudulent intent and false impersonation, is "some act in keeping with the pretense." *United States* v. *Barnow*, supra, page 77. Since ascertaining the whereabouts of suspected criminals and witnesses

in connection with official investigation is obviously a normal function of F. B. I. Agents,[1] the sustaining of the demurrer was as to this count on the ground that in demanding information as to Zaidman's whereabouts, defendants were not acting as F. B. I. Agents would act, is, we believe, plainly erroneous.

2. As to Count Two, which alleges the requisite fraudulent intent, false impersonation and demand for something of value, the ruling that the information demanded—as to the whereabouts of Zaidman—was not a "valuable thing" within the meaning of the statute unwarrantedly limits the scope of the sta' te.

(a) "The term 'or other valuable thing' (as used in Section 32) is a comprehensive one. By common consent, it means and implies a thing of value or worth to the party who obtains it." *United States* v. *Ballard,* 118 Fed. 757, 759 (Western District Missouri) and that the information demanded was valuable to defendants is indicated, we believe, on the face of the indictment, by the false pretense resorted to in order to obtain it. Indeed, "such a pretense would rarely be made for benevolent purposes." *United States* v. *Barnow,* supra, page 78.

[1] According to the Attorney General's report for the fiscal year ended June 30, 1941 (pp. 198-199), Agents of the F. B. I. located and apprehended 2,633 fugitives during that fiscal year.

The value of the information to the defendants would also, of course, be a matter for proof at the trial. Even oral information can be far more valuable than money, or other tangible property, and if the obtaining of it is not included within the proscription of the statute, then there is no limit to which imposters may go in securing confidential and other valuable information not otherwise available to them, as, for instance, by impersonating census takers, military officers,[2] or inspectors for various government regulatory agencies, in addition to F. B. I. Agents.

(b) An even more compelling reason for sustaining the applicability of the statute to the facts alleged in Count Two is that the purpose of the law is "not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority but to maintain the general good repute and dignity of the service itself." *United States* v. *Barnow*, supra, page 80. It is important "not only that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of re-

[2] "There was an increase of 34.2 percent in the number of defendants in impersonation cases filed during the fiscal year" ending June 30, 1941. "The increase in the violations of this character is apparently due to the fact that many persons for one reason or another are impersonating members of the armed forces of the United States." Annual report of the Attorney General of the United States, fiscal year ended June 30, 1941, page 105.

spect and good will for the government and its officers shall generally prevail." Idem page 78,[3] and, further "the gist of the offense is not the demanding or obtaining of the money or other thing of value of another, if it were, there might be doubt whether the act, although done with criminal intent, could be made an offense against the United States, for the reason that it has no relation to the execution of any powers of Congress or to any matter within the jurisdiction of the United States; but the gist of the offense is the false impersonation of an officer of the United States." *Littell* v. *United States,* 169 Fed. 620, 622–623 (C. C. A. 9). See also *Lamar* v. *United States,* 241 U. S., 103, 114–116; *Brafford* v. *United States,* 259 Fed. 511, 513 (C. C. A. 6); *United States* v. *McNaugh,* 42 F. (2d) 835, 837 (C. C. A. 2); *Russell* v. *United States,* 271 Fed. 684, 685 (C. C. A. 9).

Since this case presents questions of substance in connection with the enforcement of the im-

[3] "The confidence and support of citizens in every section of the country have contributed materially to the successful operation of the F. B. I. during the year." (Annual report of the Attorney General of the United States, fiscal year ended June 30, 1941, page 180.) But the good repute of the F. B. I. would, we believe, soon be dissipated, and the public would be loathe to cooperate with its agents if, for instance, it became known that the law permitted employees of collection agencies to pose as F. B. I. Agents in order to obtain information they could not otherwise secure.

personation statute affecting not only the Federal Bureau of Investigation but all Federal agencies, a review of the ruling of the District Court by the Supreme Court is warranted.

A copy of the opinion sustaining the demurrer is attached hereto.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

[Copy]

In the United States District Court, Eastern District of Missouri, Eastern Division

No. 23034

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP LEPOWITCH, ALIAS PHIL STEWART, AND MARVIN SPECTOR, ALIAS LOUIS BAKER, DEFENDANTS

OPINION

(Filed October 26, 1942)

This matter comes on for determination under a joint demurrer to the indictment filed on behalf of the defendants. The grand jury has returned an indictment in which the defendants are charged with violating Section 76, Title 18, United States Code, wherein it is alleged that the defendants falsely assumed and pretended to be agents of the Federal Bureau of Investigation. The indictment is so drawn as to be intended to reach both features of the statute—namely, count one is drawn under the phraseology of the statute covering the activities of one who falsely, in the pretended capacity, takes upon himself to act as such, while

count two of the indictment covers the other feature of the statute wherein one in such false and assumed character demands from another a valuable thing.

In the first count the indictment alleges that the defendants did falsely take upon themselves to act in the capacity of agents of the Federal Bureau of Investigation by "demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one Abe Zaidman." The second count alleges that defendants in their pretended character "did demand from the said Mrs. Adele Silk a valuable thing, to-wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman."

The demurrer is based upon one ground only—namely, that the indictment fails to state facts sufficient to charge defendants with a commission of a criminal offense against the United States of America.

The validity of Section 76, Title 18, United States Code, is not raised by the demurrer, and accordingly there is no constitutional question involved. We are concerned here only with the one feature, that of determining whether the indictment pleads facts sufficient to constitute an offense within the terms of the statute. The language of the statute is fairly clear to the extent that intent

to defraud either the United States, or any person is a necessary element of the offense, coupled with falsely assuming or pretending to be an officer or employee acting under the authority of the United States or some department thereof, or a corporation owned or controlled by the United States. Present these two conditions the statute may be violated in either of two ways condemned as illegal. First, by one taking upon himself to act in the falsely pretended character, or secondly by demanding or obtaining from any person or from the United States "any money, papers, document, or other valuable thing." Hence, the demurrer here raises the issue as to whether the defendants in falsely pretending to be agents of the Federal Bureau of Investigation and demanding of Mrs. Silk that she give the defendants information concerning the whereabouts of one Abe Zaidman constitutes, on the one hand, taking upon themselves to act as Federal Bureau of Investigation agents, or, on the other hand, constitutes demanding of Mrs. Silk "a valuable thing" within the meaning of the statute.

It is my view that the action of these defendants, while highly reprehensible, does not come within the terms of the statute. The action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be

found, is not in my opinion taking upon themselves to act as Federal Bureau of Investigation agents, nor was the information demanded by them "a valuable thing" within the meaning of the statute. It follows that the demurrer to the indictment should be sustained.

It is so ordered.

(S) GEO. H. MOORE,
United States District Judge.

Dated at St. Louis, Missouri, this 26th day of October, A. D. 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

No. 629

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

PHILIP LIEBOWITCH AND MARVIN SPECTOR, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 629

THE UNITED STATES OF AMERICA, APPELLANT

v.

PHILIP LEPOWITCH AND MARVIN SPECTOR, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the district court (R. 4–6), sustaining demurrers to the indictment, is not reported.

JURISDICTION

The jurisdiction of this Court on direct appeal is invoked under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, Pub. No. 543, 77th Cong., 2d sess., c. 295 (18 U. S. C. 682), commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925,

c. 229, 43 Stat. 936 (28 U. S. C. 345). The order of the district court sustaining demurrers to the indictment was entered on October 26, 1942 (R. 6). The order allowing the appeal was entered on November 25, 1942 (R. 8).

QUESTION PRESENTED

Whether count one of the indictment charges activities which constitute an offense under Section 32 of the Criminal Code (18 U. S. C. 76).

STATUTE INVOLVED

The statute involved is the Act of April 18, 1884, c. 26, 23 Stat. 11, as amended by the Act of March 4, 1909, c. 321, § 32, 35 Stat. 1095, and the Act of February 28, 1938, c. 37, 52 Stat. 83 (18 U. S. C. 76). This statute provides as follows:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States,

any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

This is a direct appeal from the judgment of the District Court for the Eastern District of Missouri, Eastern Division, sustaining joint demurrers of the defendants to both counts of a two-count indictment charging a violation of Section 32 of the Criminal Code, as amended (18 U. S. C. 76).

Count one of the indictment alleged that the defendants

> with intent to defraud Mrs. Adele Silk, did then and there unlawfully, knowingly, falsely and feloniously assume and pretend to be officers and employees acting under the authority of the United States, to wit, agents of the Federal Bureau of Investigation, and did then and there falsely take upon themselves to act as such by then and there in said pretended capacity, demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one Abe Zaidman; they, the said defendants not being then and there officers or employees acting under the authority of the United States, or of any department thereof, as they, the said defendants, then and there well knew; * * *. (R. 1–2.)

The second count of the indictment alleged that the defendants—

> did then and there unlawfully, knowingly, falsely, and feloniously assume and pretend to be officers and employees acting under the authority of the United States, to wit, agents of the Federal Bureau of Investigation, and in such pretended character did demand from the said Mrs. Adele Silk a valuable thing, to wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman; they, the said defendants, not being then and there officers or employees acting under the authority of the United States, or any department thereof, as they, the said defendants, then and there well knew; * * *. (R. 2–3.)

The joint demurrer of the defendants is based solely upon the ground that the indictment fails to state facts sufficient to charge the defendants with the commission of a criminal offense against the United States of America (R. 4).

In sustaining the joint demurrer the court stated (R. 6):

> It is my view that the action of these defendants, while highly reprehensible, does not come within the terms of the statute. The action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that

Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not in my opinion taking upon themselves to act as Federal Bureau of Investigation agents, nor was the information demanded by them "a valuable thing" within the meaning of the statute. It follows that the demurrer to the indictment should be sustained.

SPECIFICATION OF ERRORS TO BE URGED

1. That the district court erred in sustaining, as to count one, the demurrer to the indictment.

2. That the district court erred in holding that "the action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not * * * taking upon themselves to act as Federal Bureau of Investigation agents," within the meaning of Section 32 of the Criminal Code (18 U. S. C. 76), upon which count one of the indictment was predicated.[1]

[1] In the assignment of errors which we submitted to the district court (R. 7) and in the statements of jurisdiction and points to be relied upon on appeal (R. 10, 7) which we submitted to this Court, we asserted that we believed that the district court erred in sustaining the demurrer to the second count of the indictment and in holding as a matter of law that "the information demanded by" the defendants was not "'a valuable thing' within the meaning" of Section 32 of the Criminal Code; we indicated further that we would seek

SUMMARY OF ARGUMENT

In the absence of the phrase, by "demanding * * * information * * * concerning the whereabouts of one Abe Zaidman," in the allegation that defendants acted in their assumed capacity, the first count of the indictment would charge the commission of an offense under the statute. *Lamar* v. *United States,* 241 U. S. 193; *Pierce* v. *United States,* 314 U. S. 306, 307. That phrase does not vitiate the otherwise valid indictment.

I. To constitute the offense defined in the first portion of the statute the offender, in addition to the fraudulent intent and false impersonation, must "take upon himself to act as" the officer or employee of the United States whom he has impersonated. Since the official character impersonated may be wholly fictitious, the defendants need not have acted precisely as Federal Bureau of Investigation agents would have acted, nor even as such agents are legally authorized to act, provided the act was done with fraudulent intent. *Lamar* v. *United States,* 241 U. S. 103. All that is necessary is that the pretender do "some act in keeping with the pretense." *United States* v. *Barnow,* 239 U. S. 74, 77. Further, inasmuch as

---

reversal of this error on the present appeal. Although we do not concede that the district court did not err in its decision with respect to the second count we do not now rely on any error therein. For purposes of this case we acquiesce in the decision of the district court insofar as it results in a dismissal of the second count of the indictment.

locating the whereabouts of suspected criminals, witnesses, and other persons is one of the commonly understood routine activities of the Federal Bureau of Investigation, the court below erred in holding as a matter of law that dedendants' request could not constitute taking upon themselves to act as Federal Bureau of Investigation agents.

II. Nor can it be said as a matter of law that defendants in pretending to be Federal Bureau of Investigation agents, and in that guise requesting information as to the whereabouts of a third person, could not have had the fraudulent intent alleged in the indictment and required by the statute. The portion of the statute which is alleged to be violated in count one of the indictment requires, as its legislative history and the opinions of this Court indicate, only that the defendant do some act in keeping with the falsely assumed authority in order to deceive some person for the purpose of satisfying an ulterior end which he has in mind.

ARGUMENT

THE ALLEGATIONS IN THE INDICTMENT THAT DEFENDANTS WITH INTENT TO DEFRAUD PRETENDED TO BE FEDERAL BUREAU OF INVESTIGATION AGENTS AND IN THAT CAPACITY REQUESTED INFORMATION AS TO THE WHEREABOUTS OF A THIRD PERSON FULLY SATISFY THE REQUIREMENTS OF THE STATUTORY OFFENSE THAT DEFENDANTS SHALL WITH INTENT TO DEFRAUD TAKE UPON THEMSELVES TO ACT AS OFFICERS OF THE UNITED STATES

The first count of the indictment, after alleging the date and place of commission of the

offense and the requisite intent to defraud, charges that the defendants pretended to be officers of the United States, "to wit, agents of the Federal Bureau of Investigation, and did then and there falsely take upon themselves to act as such by then and there in said pretended capacity, demanding of * * * Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one Abe Zaidman."[1] The district judge dismissed this count of the indictment in a memorandum opinion in which, on this point, he said solely that "The action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not in my opinion taking upon themselves to act as Federal Bureau of Investigation agents * * *." We submit that the court erred in this conclusion and that the indictment properly states a crime under Section 32 of the Criminal Code (18 U. S. C., Section 76).

Although no reasons were given for the conclusion thus stated, and the language of the memorandum opinion is somewhat obscure, the case apparently turned for the district judge on

[1] This count of the indictment was intended to charge a crime under the first portion of the statute which makes it an offense for any person, "with intent to defraud either the United States or any person" falsely to pretend to be an officer of the United States and to "*take upon himself to act as such.*" [Italics supplied.]

the meaning to be given to the words "take upon himself to act as such" in the statute. It is clear that if instead of the allegation as to the manner in which defendants acted to carry out their pretense, the indictment alleged simply that the defendants falsely pretended to act as agents of the Federal Bureau of Investigation and "did then and there take upon themselves to act as such officers," without describing further the acts which they performed in their pretended capacity, it would have stated a crime under the statute. *Lamar* v. *United States*, 241 U. S. 103, 116; *Pierce* v. *United States*, 314 U. S. 306, 307.[1] Accordingly, unless the additional allegation that defendants acted in their pretended capacity by demanding information as to the whereabouts of a third person vitiates this count, it is adequate and should be upheld.

I. THE DEMAND OF DEFENDANTS IN THEIR PRETENDED CAPACITY AS FEDERAL BUREAU OF INVESTIGATION AGENTS FOR INFORMATION AS TO THE WHEREABOUTS OF A THIRD PERSON CANNOT BE SAID, AS A MATTER OF LAW, NOT TO CONSTITUTE A TAKING UPON THEMSELVES TO ACT AS FEDERAL BUREAU OF INVESTIGATION AGENTS

The district judge apparently thought that the act of requesting information as to the where-

[1] *I. e.*, count 1 of the indictment "charges the illegal acts complained of and the requisite fraudulent intent, states the date and place of the commission of the acts charged and gives the * * * official character of the officer whom the accused * * * [were] * * * charged with having falsely personated." *Lamar* v. *United States*, 241 U. S. 103, 116.

abouts of a third person was so unrelated to the activities which are normally understood to be among the duties of Federal Bureau of Investigation agents that defendants could not reasonably be thought by Mrs. Silk to have been Federal Bureau of Investigation agents when, posing as such, they interrogated her.[4] However, it is common knowledge that Federal Bureau of Investigation agents in the normal course of their duties constantly request information as to the whereabouts of divers third persons, either to apprehend fugitives from justice[5] or to obtain witnesses, or to interrogate persons who might possess

[4] The language of the memorandum opinion suggests that the defect in this count was in that portion of the indictment which we have quoted at the beginning of our argument (*supra*, p. 8). In view of *Lamar* v. *United States*, 241 U. S. 103, 116, it is clear that the request for information made by defendants was not *in fact* required to be of the sort which the Federal Bureau of Investigation would authorize its agents to make. And *a fortiori* the indictment was not required to state formally that a Federal Bureau of Investigation agent is authorized in the course of his duties to make inquiries of this sort. Since the count specifies that defendants pretended to be agents of the Federal Bureau of Investigation and took upon themselves to act as such by demanding "in said pretended capacity" the information concerning the whereabouts of Zaidman, it cannot be said that the indictment was defective in specifying the capacity in which defendants acted. The judge's objection, therefore, must have gone to some other apparent defect in this part of the count. The asserted defect to which we advert in the text is the only possible inadequacy which we can perceive in this portion of the count.

[5] *E. g.*, during the fiscal year 1942, 3,827 fugitives from justice were apprehended by the Federal Bureau of Investi-

information with respect to offenses committed against the United States. Indeed, a request for information of the sort here involved conforms to, rather than departs from, the common understanding of the character in which defendants pretended to act. At worst, therefore, even if it is conceded that a conviction under this count of the indictment depends upon whether only the very incredulous would be deceived by defendants' conduct (but cf. *Pierce* v. *United States*, 86 F. (2d) 949 (C. C. A. 6), reversed on other grounds, 314 U. S. 306), the question should have been left to the jury. Certainly acts of the sort here charged cannot, as a matter of law, be said to be at such variance with the guise assumed by defendants that by their conduct they could not have taken upon themselves to act as Federal Bureau of Investigation agents. In view

---

gation (*Annual Report of the Attorney General of the United States* for the fiscal year ended June 30, 1942 (unpublished), p. 260–A). In the same year 37,486 delinquent registrants under the Selective Service Act were located and complied with the provisions of the Selective Service Act, thus becoming available for service in the armed forces. (Ibid., p. 244.)

The *Annual Report of the Attorney General of the United States* for the fiscal year 1941 shows that during that year 2,633 fugitives were apprehended by the Federal Bureau of Investigation (p. 199).

During the fiscal year 1940, 2,389 fugitives were apprehended by the same Bureau (*Annual Report of the Attorney General of the United States*, 1940, p. 177).

During the fiscal year 1939, 1,890 fugitives were apprehended (*Annual Report of the Attorney General of the United States*, 1939, p. 160).

of the otherwise sufficient content of this count of the indictment (cf. *Pierce* v. *United States*, 314 U. S. 306, 307; *Lamar* v. *United States*, 241 U. S. 103, 116) it was clearly erroneous to hold that the request for information which defendants are charged with having made renders the count defective.

Moreover, it is obvious that the criminal character of the behavior under this section of the statute does not depend upon the defendants' ability to convince the most skeptical. *Pierce* v. *United States*, 86 F. (2d) 949, 952 (C. C. A. 6), reversed on other grounds, 314 U. S. 306, 307. The statute, as we point out below (see *infra*, pp. 15–20), was not designed merely to protect the individual citizen from being imposed upon to his disadvantage. It was also intended to preserve the good repute and dignity of federal authority from the eroding effects of frequent spurious assertion. Accordingly, the requirement that a defendant "take upon himself to act as" an officer of the United States is met when the defendant does "some act in keeping with the pretense" (*United States* v. *Barnow*, 239 U. S. 74, 77).

We submit that requesting information as to the whereabouts of a third person was unmistakably an act "in keeping with the pretense" that the defendants were Federal Bureau of Investigation agents, and that the allegations of Count 1 of the

indictment satisfy the requirements of the statute that the defendant "take upon himself to act" as a federal officer.

II. THE DEMAND OF DEFENDANTS IN THEIR PRETENDED CAPACITY AS FEDERAL BUREAU OF INVESTIGATION AGENTS FOR INFORMATION AS TO THE WHEREABOUTS OF A THIRD PERSON CANNOT BE SAID, AS A MATTER OF LAW, TO HAVE BEEN MADE WITHOUT THE INTENT TO DEFRAUD WHICH IS REQUIRED BY THE STATUTE AND ALLEGED IN THE INDICTMENT

Although the District Court's opinion does not point to this question, the argument may be made that the demurrer to the first count should have been sustained because the statutory requirement of an "intent to defraud" could not exist where the only act done in the assumed character is requesting information as to the whereabouts of a third person. We submit that this argument cannot be sustained.

The indictment charges defendants specifically with "intent to defraud one Mrs. Adele Silk". Even if the narrowest possible construction were given to the statute, it cannot be said as a matter of law that the required and alleged "intent to defraud" cannot be embodied in a request for information as to the whereabouts of a third person. For example, knowledge of the whereabouts of a fugitive from justice may have a value to the person possessing it, and it may be to his advantage to keep that knowledge from all but the appropriate authorities—as where there is a reward offered

for such information.* Compare *Reed* v. *United States*, 252 Fed. 21 (C. C. A. 2). Clearly, it is possible for a person making inquiries as to the whereabouts of the fugitive under those circumstances to be making them with an intent to defraud the innocent person (to whom the inquiries are addressed) of his reward. At most, therefore, whether or not the intention to defraud accompanies a request of the sort here involved is a question which should be submitted to the jury. Certainly it cannot be decided on the pleadings where, as here, they are otherwise sufficiently specific and detailed to charge the offense. *Lamar* v. *United States*, 241 U. S. 103, 116; *Pierce* v. *United States*, 314 U. S. 306, 307.

Moreover, we submit that the requirement of an "intent to defraud" in this portion of the statute is met when the defendant seeks to deceive a third person by pretending to be a federal officer (and acts as such) for the purpose of satisfying some ulterior ends of his own. Under that construction, the conduct here charged obviously satisfies the statutory definition of the offense. If we are correct in that construction, the failure of

*E. g., The Act of June 6, 1934, c. 408, 48 Stat. 910 (18 U. S. C. 575), authorized the appropriation of $25,000.00 to be apportioned and expended in the discretion of, and upon such conditions as may be imposed by the Attorney General of the United States as a reward or rewards for the information leading to the arrest of anyone who is charged with a violation of the laws of the United States, or any state, or of the District of Columbia.

the court below to permit the case to go to trial was clearly error. Accordingly, it is appropriate to urge the propriety of our position with respect to the construction of the statute here.

Examination of the structure of the section discloses that two offenses are contained therein—"one, the assuming and pretending to be an officer or employee acting under the authority of the United States and taking it upon himself to act as such, the other, in such pretended character demanding or obtaining any money, paper, document, or other valuable thing." *Elliott* v. *Hudspeth*, 110 F. (2d) 389, 390 (C. C. A. 10).[1] It is apparent that in the first portion of the section Congress purported to reach conduct which did not necessarily entail fraudulently extracting or attempting to extract things of value from innocent third persons. Indeed, unless the stricture of the first portion reached behavior which was not covered by the second, the former would be superfluous. And the behavior which Congress sought to proscribe by the first portion, as well as the broad sweep of the proscription which it thus enacted, becomes apparent on examining the differences between the first and second portions of the statute. To commit an offense under the former the

[1] The second portion of the section makes it a separate offense for a person "with intent to defraud either the United States or any person" to pretend to be a federal officer, and "in such pretended character demand or obtain from any person or from the United States * * * any money, paper, document, or other valuable thing * * *."

impersonator need only "take upon himself to act as" a federal officer. Under the latter he must in his pretended capacity "demand * * * [some] * * * money, paper, document, or other valuable thing". The meaning of each portion of the section, and of the requisite "intent to defraud," under each, must be appraised in the light of that contrast. Viewed in that light the language of the first portion permits little doubt that by it Congress prohibited all attempts to deceive third persons for some ulterior purpose by impersonating federal officers, and not merely attempts to defraud third persons by such pretenses.*

The validity of this conclusion as to the scope of the first portion of the statute is more fully demonstrated by an examination of the objectives which Congress sought to achieve in enacting Sec-

* This conclusion does not, of course, render the second portion of the statute superfluous. In the first place, an aggravated offense is committed when the attempt is not merely to deceive, but to deprive a third person of a thing of value. Hence, a more severe punishment is provided where the object of the impersonation is not merely to deceive by falsely assuming federal authority (thus violating the first portion of the statute) but also to deprive a person of a thing of value by the same pretense (thus violating the second portion of the statute). In the second place, there may be offenses under the second portion of the statute which are not violations of the first portion, *e. g.*, where an offender pretends to be a pension claims investigator but demands only lodging or board from a third person. It is questionable whether such a demand would constitute a taking "upon himself to act as" a pension claims investigator.

tion 32 of the Criminal Code. As this Court has recognized, "It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority but to maintain the general good repute and dignity of the service itself." *United States* v. *Barnow*, 239 U. S. 74, 80. The legislative history of the section permits no dispute as to the intention of Congress to protect innocent persons from loss through reliance upon false assumption of federal authority.[9] And equally little doubt is left by the legislative history as to the intention to protect "the general good repute and dignity of the service itself."

The first Congressional attempt to deal with the problem of false impersonation of federal officers took the form of a Senate amendment to the legislative appropriation bill of 1883. The origins and objectives of the amendment were reported by its sponsor, Senator Allison, who said that the provision had been suggested by the Commissioner of Pensions, and that the latter

> * * * states to the committee that a great many persons are representing themselves as the agents and employés of the Pension Office who are not such agents or employés, thus imposing on a great many innocent people. *It is important to the protection of the proper employés of the office that this provision should become a law.* * * * [Italics added.] (14 Cong. Rec. 3238).

[9] See *e. g.* 14 Cong. Rec. 3238, 3263.

The terms of the proposed amendment [10] disclose that it was designed to do more than prevent pecuniary losses to pension claimants or to the United States. The legislation was, as its text shows, and its sponsor said, important for "the protection of the proper employés of the office". That it would also reach attempts at fraudulent acquisition by persons pretending to be pension officers is for present purposes beside the point. The significant fact is that the proposal was intended to, and would, punish false impersonation of federal officers, regardless of the purpose of the impersonation, because such impersonation was regarded as damaging to the efficient operation of government.

Although senatorial approval of the substance of the amendment was voiced, its inclusion in an appropriation bill was objected to, and it was therefore withdrawn to await introduction as a separate bill.[11]

On the Monday following the withdrawal of the amendment, the Senate Judiciary Committee

[10] It provided: "Any person who falsely represents himself to be an officer, agent, or employé of the Pension Bureau of the Interior Department, or in such assumed character pretends or assumes to act and perform or does perform in such assumed character any duty or act belonging to such officer, agent, or employé so falsely personated, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding $1,000, or be imprisoned for a period not more than two years, or both, in the discretion of the court" (14 Cong. Rec. 3238).

[11] 14 Cong. Rec. 3238.

reported a bill to punish the false impersonation of officers and employees of the United States. That this bill, which was almost identical with, and ultimately became, the present Section 32 of the Criminal Code,[12] was understood to embody the broad principle contained in the initial proposal is suggested by the remarks of its sponsor[13] and of Senator Blair. The latter said of the bill:

> This covers a very important and grievous abuse in the administration of the pension law. On the objection being made to the necessary legislation being attached to the appropriation bill last Saturday I introduced a bill, which was referred to the Committee on Pensions, covering simply the difficulty so far as the administration of

[12] Although the bill was passed by the Senate, it was not considered in the House in that Congress. However, the same bill was introduced in the Forty-eighth Congress (S. 1563; H. R. 4993) and with minor amendments was passed by both houses, later becoming Section 32 of the Criminal Code (15 Cong. Rec. 1144, 1156, 1177, 1285, 2256, 2318, 2627, 2676, 2729, 2827, 3368).

[13] In introducing the bill, Senator Garland indicated that it originated with the earlier abortive amendment to the legislation bill. Concerning his proposal he said: "Mr. President, section 5435 of the Revised Statutes makes provision against persons falsely representing themselves to be entitled to certain annuities, dividends, pensions, * * * etc. from the Government, and section 5448 makes provision for punishing persons who falsely represent themselves as revenue officers. There the statutes stop. *This bill provides for punishing persons who represent themselves as officers or employés or agents of the United States in any respect whatever.*" [Italics supplied.] (14 Cong. Rec. 3263.)

> the pension law is concerned. The Committee on the Judiciary has very properly taken jurisdiction of the subject in its wider sense and reported this bill, which will cover all cases of like abuse. * * * (14 Cong. Rec. 3263–3264.)

It is apparent from the foregoing remarks that in thus providing in Section 32 of the Criminal Code for the punishment of persons who pretend to be federal officers and undertake to act as such, Congress understood that the legislation was "important to the protection of the proper employés" of the Government, and sought in part to protect the good repute of Government officers and thereby the proper functioning of the Government machinery.[14] And this intention has long been given effect by this Court. *United States* v.

[14] Consistent with the Congressional view of the scope of the statute disclosed by the legislative history are two items of evidence which of themselves are not of major significance but which in the context of the legislative history have some relevance. The bill which became Section 32 of the Criminal Code was entitled "A bill making it a felony for a person to falsely and fraudulently assume or pretend to be an officer or employé acting under authority of the United States, or any Department or any officer thereof, and prescribing a penalty therefor" (15 Cong. Rec. 2627). Moreover, the provisions contained in this section are classified by Congress in the Criminal Code (35 Stat. 1088, 1093–1104) and appear in the United States Code (18 U. S. C. Sections 71–170), along with a variety of other offenses addressed to abuses of the authority of the United States, under the general heading "Offenses against operations of Government." While neither of these facts can, of course, change or add to the meaning of the section (cf. *Warner* v. *Goltra*, 293 U. S. 155,

Barnow, 239 U. S. 74; *Lamar* v. *United States*, 241 U. S. 103; cf. *Reed* v. *United States*, 252 Fed. 21 (C. C. A. 2).

In a real sense impersonations of federal officers, when coupled with inquiries of the sort here made, have the effect of "impairing, obstructing, or defeating the lawful function of * * * [a] * * * Department of the Government." *United States* v. *Barnow*, 239 U. S. 74, 79. In a large measure the Government depends upon the cooperation of its citizens for the effective enforcement of its laws.[15] The confidence and support of citizens which is thus necessary to the successful functioning of nearly every governmental department might easily be dissipated if

160–162), they support the conclusion indicated by the language and history of the section that the protection of the good repute and authority of federal officers, and thereby the operations of the federal government, was one of the objectives of its enactment.

[15] "Private citizens individually and through patriotic organizations such as civic clubs, American veterans' organizations, and fraternal organizations have been most cooperative during the year by reporting national security matters to the FBI. * * * The successful operation of the FBI during the past year is a tribute to the confidence and support of loyal Americans in every part of the nation." (*Annual Report of the Attorney General of the United States, Fiscal Year Ended June 30, 1942* (unpublished), p. 242–243).

"The confidence and support of citizens in every section of the country have contributed materially to the successful operations of the FBI during the year." (*Annual Report of the Attorney General of the United States, Fiscal Year Ended June 30, 1941*, p. 180).

frauds such as the one under consideration are permitted to go unpunished. That Congress was conscious of this evil and sought to curb it by the present statute the Congressional debates suggest. That it accomplished its purpose in Section 32 of the Criminal Code this Court has held. As it said in *United States* v. *Barnow*, 239 U. S. 74, 78, 80:

> In order that the vast and complicated operations of the Government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employés be respected in particular cases, but that a spirit of respect and good-will for the Government and its officers shall generally prevail * * *
>
> * * * * *
>
> It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself. * * *

Viewing the section as a whole, and taking into consideration the acknowledged objectives of Congress in enacting it, it cannot be doubted, therefore, that the first portion of Section 32 of the Criminal Code prohibits any impersonation of a federal officer by which the impersonator seeks to deceive a third person in order to satisfy some

ulterior purpose of his own. We submit that count one of the indictment charges a crime under the statute as so construed.

CONCLUSION

For the reasons stated above, we respectfully submit that the district court's construction of Section 32 of the Criminal Code, as amended, was erroneous; that the first count of the indictment alleges a violation of the statute; and that the judgment sustaining the demurrer to that count should be reversed and the cause remanded for further proceedings.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
GEORGE F. KNEIP,
JAMES W. KNAPP,
Attorneys.

FEBRUARY, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

No. 629.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE UNITED STATES OF AMERICA,
Appellant,

v.

PHILIP LEPOWITCH and MARVIN SPECTOR,
Appellees.

On Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

BRIEF FOR APPELLEES.

HENRY S. JANON,
Attorney for Appellees.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

CITATIONS.

Cases:

Cases—Continued:

Cases—Continued:

Statutes:

U. S. Constitution:

Miscellaneous:

No. 629.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE UNITED STATES OF AMERICA,
Appellant,

v.

PHILIP LEPOWITCH and MARVIN SPECTOR,
Appellees.

On Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

BRIEF FOR APPELLEES.

OPINION BELOW.

The opinion of the District Court (R. 4-6) sustaining the joint demurrer to both counts of the indictment, is not reported.

JURISDICTION.

The jurisdiction of this Court on direct appeal from the judgment of the District Court sustaining the joint demurrer to the indictment, is invoked under the Act of

March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, Pub. No. 543, 77th Cong. 2nd sess., c. 295 (18 U. S. C. 682), commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). The order of the District Court sustaining the joint demurrer to both counts of the indictment was entered on October 26, 1942 (R. 6). The order allowing the appeal was entered on November 25, 1942 (R. 8).

QUESTION PRESENTED.

The single question presented is whether the allegations charged in count one of the indictment constitute an offense under Section 32 of the Criminal Code (18 U. S. C. 76).

STATUTE INVOLVED.

The statute involved is the act of April 18, 1884, c. 26, 23 Stat. 11, as amended by the Act of March 4, 1909, c. 321, Section 32, 35 Stat. 1095, and the Act of February 28, 1938, c. 37, 52 Stat. 83 (18 U. S. C. 76). The statute reads as follows:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

STATEMENT.

This is a direct appeal by the United States from the judgment of the District Court for the Eastern District of Missouri, Eastern Division, sustaining a joint demurrer of the defendants to both counts of a two-count indictment. The first count of the indictment sought to charge a violation of the first clause of Section 32 of the Criminal Code (18 U. S. C. 76), and the second count sought to charge a violation of the second clause of that statute. The appellant, however, has now voluntarily abandoned its objection to the ruling of the District Court in sustaining the joint demurrer as to the second count of the indictment,[1] and same is not now before this Court on this appeal.[2]

The material part[3] of count one of the indictment, charges that on September 1, 1942, the defendants

> "* * * with intent to defraud one, Mrs. Adele Silk, did * * * pretend to be * * * agents of the Federal Bureau of Investigation, and did * * * take upon themselves to act as such by * * * demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one, Abe Zaidman. * * *" (R. 1, 2).

The material part[3] of count one of the indictment, charges that on September 1, 1942, the defendants

> "* * * with intent to defraud one Mrs. Adele Silk, did * * * pretend to be * * * agents of the Federal Bureau of Investigation, and * * * did demand from

[1] In the appendix "1", pages 5, 6 of Appellant's Brief, we find the following: "Although we do not concede that the district court did not err in its decision with respect to the second count we do not now rely on any error therein. For purposes of this case we acquiesce in the decision of the district court insofar as it results in a dismissal of the second count of the indictment."

[2] See Southeastern Express Co. v. Miller, 264 U. S. 541, 542.

[3] We elliptify the indictment for the sake of clarity, since we admit that the false impersonation is adequately charged.

> the said Mrs. Adele Silk a valuable thing, to wit: demand that she the said Mrs. Adele Silk then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman * * *" (R. 2, 3).

The factual case was, though the record does not disclose same, that the defendants were employes of a local credit clothing company, and that Abe Zaidman had previously purchased some clothing from the defendants' employer on the installment plan. Thereafter he became delinquent in his account, and defendant Lepowitch telephoned Mrs. Adele Silk to ascertain the whereabouts of Abe Zaidman in order to contact him and request him to make a payment on his said account. In the course of the telephone conversation, defendant Lepowitch, at the suggestion of defendant Spector, told Mrs. Silk that he was an agent of the Federal Bureau of Investigation. It would seem from the language of the second count of the indictment, that the defendants merely "demanded" but did not actually obtain the information sought by them, from Mrs. Silk. We make this statement dehors the record apologetically, for though it is of no effect on this appeal,[4] we felt it would be helpful to the Court to know the transaction which led to the indictment.

---

[4] Maryland Casualty Co. v. Jones, 279 U. S. 792, 796.

SUMMARY OF ARGUMENT.

1. The "intent to defraud" is an essential element of the offense.

2. The words "intent to defraud" as used in this statute, mean the intention of depriving another of money or property by falsely posing as a Federal officer.

3. The oral information sought from Mrs. Silk, as to the whereabouts of Abe Zaidman, is neither money nor property, and consequently is not subject to defraudment.

4. The overt act required by the statute relates to the "intent to defraud," and must be an act committed in pursuance thereof and sufficiently associated thereto, as to convert the fraudulent intent into a fraudulent attempt.

5. The indictment charging an overt act must recite the facts comprising the overt act.

6. Indictments charging fraudulent conduct must recite the facts that comprise the fraudulent conduct, and general allegations are insufficient.

7. The allegation charging the overt act serves two purposes in the indictment, (1) a recital of the facts comprising the overt act, and, (2) a description of that which Mrs. Silk was sought to be defrauded. Since information as to the whereabouts of a third person is not property, nor a subject of property, it is not a subject of defraudment. The indictment, therefore, affirmatively negatives an intent to defraud, and does not state an offense.

ARGUMENT.

Appellant has raised three points in its brief on this appeal, which we summarize herein for the sake of clarifying the issues. Appellant's position seems to be:

1. That if the indictment had merely charged that the defendants took upon themselves to act as the impersonated officers, without describing what act they performed in their pretended capacity, it would be a valid and sufficient indictment; and, therefore,

(a) the words

> "by then and there in said pretended capacity, demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one, Abe Zaidman,"

which describes the overt act, is mere surplusage and should be disregarded, and, when so disregarded, the indictment is valid and sufficient.

2. That the said overt act clearly related to the usual duties of the officers impersonated, and that, therefore, said act was in keeping with the pretense.

3. That the phrase "with intent to defraud" appearing in the first clause of the statute, ought not to be given its usual and ordinary meaning, i. e., with the intention of depriving another of property by deceitful means, but that the import of the phrase "with intent to defraud" is merged in and is fully satisfied by the deceit inherent in the false impersonation; because,

(a) The main purpose and aim of the statute is to protect the good repute and dignity of the Federal service by prohibiting false impersonations thereof.

In the interests of perspicuity, we shall not treat appellant's points in the sequence in which they appear above.

We prefer instead to thoroughly analyze the statute, and the indictment with respect to the statute, and in that fashion fully answer appellant's contentions, and moreover, demonstrate that the indictment does not charge an offense under the statute.

I.

The "Intent to Defraud" Is an Essential Element of the Offense.

(a) The legislative history of the statute.

The statute in question[5] was submitted in the House of Representatives, by Representative Browne of Indiana, who stated the object of the bill[6] as follows:[7]

> "The bill provides a penalty against certain banditti that are now prowling over the country and levying blackmail on pension claimants."

No other record comment was made in the House on this bill. In the Senate, the only comment made on the bill was by Senator Garland, who, as Chairman of the Senate Committee on Judiciary, in reporting the bill back to the Senate, stated:[8]

> "* * *. As the bill is one of importance and is being pressed by the Pension Office particularly, I ask for its present consideration."

The bill, which was approved on April 18, 1884, bore the following preamble or title:[9]

---

[5] Sec. 32 of the Criminal Code (18 U. S. C. 76).

[6] H. R. 4993, 48th Cong. 1st sess., 15 Cong. Rec. 1156.

[7] 15 Cong. Rec. 2256, 48th Cong., 1st sess.

[8] 15 Cong. Rec. 2627, 48th Cong., 1st sess. The omitted part of Sen. Garland's remarks related to the reporting of the bill back to the Senate, with the amendment of the insertion of the words "or any officer" after the word "Department" in the two places where same appeared in the bill.

[9] 15 Cong. Rec. 3368, 48th Cong., 1st sess.

> "An act making it a felony for a person to falsely and fraudulently assume or pretend to be an officer or employe acting under authority of the United States, or any department or any officer thereof, and prescribing a penalty therefor."

It is particularly significant that the preamble or title of the bill[10] requires that the impersonation be both "falsely and fraudulently." It is also particularly significant that Rep. Browne, the sponsor and legislative member in charge of the bill[11] described it as operating on "certain banditti" who are "levying blackmail." It is no coincidence that the title of the bill, the remarks of its sponsor explaining its objective, and the very words of the statute[12] specifically and affirmatively contemplate the existence of an "intent to defraud" as an element of the offense.

In the second session of the 47th Congress, (Saturday, February 24th., 1883), Senator Allison offered an amendment to the appropriation bill, making it a misdemeanor for a person to, falsely impersonate an officer or employe of the Pension Office, and act as such.[13] This amendment was forthwith withdrawn upon the objection of Senator Edmunds who said:[14]

> "Some law of this kind undoubtedly ought to be passed; * * *. Now, there ought to be a law punish-

---

10 The preamble or title of an act may be considered in ascertaining the legislative intent. Coosaw Min. Co. v. So. Carolina, 144 U. S. 550, 563; Church of the Holy Trinity v. United States, 143 U. S. 457, 462.

11 The statements made on the floor of Congress by the legislative member in charge of the bill may be considered in ascertaining its meaning and intent: United States v. Great Northern R. Co., 287 U. S. 144, 154; Wright v. Mountain Trust Bank, 300 U. S. 440, 463.

12 "Whoever, with intent to defraud * * *"

13 (14 Cong. Rec. 3238.) This proposal did not contemplate the requirement of an intent to defraud.

14 (14 Cong. Rec. 3238.) The omitted part of Senator Edmunds' remarks related to generalizing a proper bill to cover the entire Federal service, and not limited to the Pension Office.

ing every person who falsely personates any officer or employe of the United States for the purpose of committing any wrong or fraud upon anybody; that is plain enough; * * * it can pass by unanimous consent in two minutes, I have no doubt."

Later that same day, Senator Blair submitted a bill[15] in the identical language of Senator Allison's proposal. On the Monday following (February 26th, 1883), Senator Garland submitted, on behalf of the Judiciary Committee of which he was a member, a bill[16] which was forthwith considered by the Senate as a Committee of the Whole, and forthwith passed unanimously.[17] Senator Blair's bill (S. 2506) died in the Judiciary Committee. Congress adjourned sine die before Senator Garland's bill (S. 2507) could reach the House.[18] The bill that Rep. Browne submitted in the House (H. R. 4993) in the next session of Congress (48th Session, 1st session), and which passed both Houses of Congress and became Section 32 of the Criminal Code (18 U. S. C. 76), was in the identical words of the bill submitted by Senator Garland (S. 2507, 47th Cong. 2nd sess.), which served as a substitute measure in place of Senator Blair's bill (S. 2506, 47th Cong. 2nd sess.).

15 S. 2506, 47th Cong., 2nd sess., 14 Cong. Rec. 3239, which reads as follows: "Any person who falsely represents himself to be an officer, agent, or employe of the Pension Bureau of the Interior Department, or in such assumed character pretends or assumes to act and perform or does perform in such assumed character any duty or act belonging to such officer, agent, or employe so falsely personated, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding $1,000, or be imprisoned for a period not more than two years, or both, in the discretion of the court."

16 S. 2507, 47th Cong., 2nd sess., 14 Cong. Rec. 3263, which reads as follows: "Any person, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employe acting under the authority of the United States, or any department of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

17 14 Cong. Rec. 3263, 4.

18 15 Cong. Rec. 1285.

It is noted that the bills proposed by Senators Allison and Blair, which were short-lived, did not include the element of intent to defraud, and that Senator Garland's bill (S. 2507, 47th Cong. 2nd sess.), and Rep. Browne's bill (H. R. 4993, 48th Cong. 1st sess.) which were enacted into law, specifically included the element of intent to defraud.

By the rules of simple reasoning we conclude that Senator Allison's proposal and Senator Blair's bill making it a misdemeanor for a person to falsely impersonate a federal officer and act as such[19] was considered by Congress and that later Congress selected instead the bill making it a felony for one to falsely impersonate and act as a federal officer with the intent to defraud the United States or any person.[20] It is a rule of construction, recognized and announced by this Court, that where Congress in enacting a law acts specifically only on one of two recommended bills, it indicates that the language of the bill acted upon and enacted into law was preferred by Congress, and the words thereof must be taken at their face value. See Helvering v. Wood, 309 U. S. 344, 348. In enacting the later bill it is clear that Congress purposely added the element of intent to defraud, made the offense a felony instead of a misdemeanor, and increased the maximum punishment from two years to three years in the penitentiary.

As recent as Pierce v. United States, 314 U. S. 306, this Court, in discussing the legislative history of this statute, said (l. c. 307):

> "The section has been upon the statute books since April 18, 1884. 23 Stat. at L. 11, chap. 26. It was passed because of reports to Congress by the Pension Office of **fraudulent practices** affecting pension claimants." (Emphasis added.)

---

[19] 14 Cong. Rec. 3238, 9, 47th Cong., 2nd sess.

[20] H. R. 4993, 48th Cong., 1st sess., now Sec. 32 of the Criminal Code (18 U. S. C. 76).

I.

"Intent to Defraud" Is an Essential Element of the Offense.

(b) An analysis of the statute, with reference to the "intent to defraud."

It will be noted that the element of "intent to defraud" received prominent recognition both in the legislative history and in the express language of the statute. The statute in question (Sec. 32 of the Criminal Code, 18 U. S. C. 76) embodies two distinct offenses, and the first count of the indictment sought to charge defendants with the offense prescribed in the first clause thereof. The elements of such offense[21] as are material to the case at bar are:

1. with intent to defraud a person.[22]
2. falsely pretend to be a Federal officer, and,
3. act as such, i. e., commit an overt act.

To constitute a violation thereof there must be the concurrence of all three elements, i. e., the intent to defraud a person, the false impersonation, and the commission of an overt act. It will be readily seen that neither the false impersonation with the intent to defraud, absent the overt act, nor the false impersonation and the overt act, absent the intent to defraud, is sufficient to constitute a violation of the statute. All three elements find their source in the very words of the statute, and are of essence to the commission of the offense, and the failure or absence of any

[21] In United States v. Barnow, 239 U. S. 74, 78, the statute is summarized as follows:

> "Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States or any department or officer of the government, if done with an intent to defraud, and accompanied with any of the specified acts done in the pretended character * * *"

[22] The statute denounces the false impersonation if made "with intent to defraud either the United States or any person." In the case at bar, the indictment charges an intent to defraud Mrs. Silk, a person, and not the United States.

one element is a fatal defect (Baas et al. v. United States, 25 Fed. [2d] 294, 295 [C. C. A. 5]).

If it should be said that the words "intent to defraud" in the statute are mere surplusage,[23] we ask then, Didn't Congress make the offense a felony instead of a misdemeanor, and increase the punishment because the inclusion of the element of intent to defraud made it a more heinous offense than mere false impersonation? We cannot ascribe a senseless purpose to Congress, but rather, as this Court said in Montclair v. Ramsdell, 107 U. S. 147, 152:

> "It is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."

See also, Ginsberg & Sons v. Popkin, 285 U. S. 204, 208, where it is said:

> "if possible, effect shall be given to every clause and part of a statute."

Particularly apropos is the principle announced by this Court in Stephens v. Cherokee Nations, 174 U. S. 445, 480, that words in a statute cannot be rejected as redundant or surplusage where they can be given full effect, nor can it be assumed that they tend to defeat the real object of the enactment, but rather that they are in effectuation of the real object thereof. In the case at bar the statute expressly includes the words, "with intent to defraud" and a comparison of the language, purpose and structure of this statute with that of the false pretense statutes of the various states will demonstrate that this statute was patterned therefrom and was enacted to serve, as indeed it does serve, as the Federal false pretense statute. Its only dif-

[23] "But the admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words." Strong, J., in Platt v. Union P. R. Co., 99 U. S. 48, 58.

ference therefrom is that the Federal statute limits the false pretense to false impersonation of a federal officer (for constitutional reasons) while the state statutes denounce any false pretense; also, the state statutes declare the completed defraudment[24] to be a felony, and the incompleted defraudment[25] a misdemeanor, whereas the Federal statute expressly declares both the completed defraudment[26] and the incompleted defraudment[27] as felonies and violative of the statute.

Applying the rule that a statute patterned after the statute of another state, is presumed to take with it the meaning it had in such state (Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 130; Brown v. Walker, 161 U. S. 591, 600), a review of the decisions of the courts of the various states will conclusively demonstrate that where the false pretense statute requires an act to be done "with intent to defraud" that such intent is a necessary element, and means doing an act with the purpose and intention of depriving another of property, by false pretenses.

A reading of the cases of Pierce v. United States, 314 U. S. 306; United States v. Barnow, 239 U. S. 74; and, Lamar v. United States, 241 U. S. 103, establish beyond a peradventure of a doubt, that the statute affirmatively contemplates the existence of the element of "intent to defraud," to be violative thereof.

It is a cardinal rule of construction that a penal statute will not be so construed as to destroy the effect of a

---

[24] The actual obtaining of property by false pretenses.

[25] The doing of an overt act, with the intent to deprive another of property by false pretense, but which act falls short of actually obtaining the property.

[26] "* * * obtain from any person * * * any money, paper, document or other valuable thing * * *" (Sec. 32 of Criminal Code [18 U. S. C. 76], second clause thereof).

[27] The overt act done with the intent to defraud a person, i. e., to deprive another of property, by the false impersonation, which act falls short of actual accomplishment (Sec. 32 of the Criminal Code [18 U. S. C. 76], first clause thereof), or, "* * * demand * * * from any person * * * any money, paper, document, or other valuable thing * * *" (Sec. 32 of the Criminal Code [18 U. S. C. 76], second clause thereof).

kindred statute; but that such construction will be given to both as will reconcile and render both effective, as parts of one harmonious and synchronous scheme of penal legislation (United States v. Borden Co., 308 U. S. 188, 198; Bird v. United States, 187 U. S. 118, 124; Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 409; Beals v. Hale, 4 How. 37, 51). Kindred to the statute involved in the case at bar, is the Act of Nov. 21, 1921, c. 134, Sec. 6, 42 Stat. 224, 18 U. S. C. 77, now Title 18 U. S. Code, Sec. 77a, which makes it an offense for a person to

1. falsely impersonate a federal officer, and
2. arrest a person or search a person or building.

The element of "intent to defraud" is absent from this latter statute. The two statutes together comprise the scheme of federal legislation on the subject of false impersonation of the general federal service.[28] The one (first clause, 18 U. S. C. 76)[29] makes it a felony to falsely impersonate with intent to defraud, and commit an overt act, the other (18 U. S. C. 77a) makes it a misdemeanor to falsely impersonate (without an intent to defraud) and commit a specified overt act. By giving such statutes the foregoing meanings, respectively, we can harmoniously give full effect to both. But, if we construe away or judicially delete the "intent to defraud" as an essential element in Title 18 U. S. Code, Sec. 76, an absurdity results in this, that Title 18 U. S. Code, Sec. 77a becomes a useless statute, for every violation of Title 18 U. S. Code, Sec. 77a would necessarily be a violation of Title 18 U. S. Code, 76 and could be prosecuted thereunder as a felony. Let us observe how this comes about. By construing away or judicially deleting the "intent to defraud"

[28] Title 18, U. S. Code, Sec. 123, relates to false impersonation of Revenue officers only.

[29] We analyze the first clause of the statute only, because the only indictment (count one) on this appeal is admittedly based on the offense designated in the first clause of the statute.

as an essential element in Title 18 U. S. Code, Sec. 76, it is violated by:

1. False impersonation of a Federal Officer, and
2. Act as such, i. e., commit an overt act.

Title 18 U. S. Code, Sec. 77a, is violated by:

1. False impersonation of a Federal Officer, and
2. Act as such, i. e., commit an overt act,

(a) by arresting a person (depriving him of his constitutional right of liberty, U. S. Const. Amend. V), or

(b) searching a person or a building (depriving him of his constitutional right of freedom from unreasonable search, U. S. Const. Amend IV).

Since Title 18 U. S. Code Sec. 76, would be satisfied by any overt act in keeping with the pretense, it would be satisfied, a fortiori, where the overt act consisted in arresting a person or searching a person or building. Hence, every violation of Title 18 U. S. Code Sec. 77a, would necessarily be a violation of Title 18, U. S. Code Sec. 76, and we would have the absurd situation of two statutes covering the same offense, one a felony and the other a misdemeanor. The absurdity borders on the ridiculous when we consider that any overt act, such as asking a lady for information as to the whereabouts of a third person, is a felony with three years imprisonment, whereas the overt act of arresting a person or searching a person or building (expressly forbidden by the United States Constitution) is a misdemeanor with only one year imprisonment.[30] But

[30] A like comparative analysis of the operative effect of Title 18, U. S. Code, Sec. 123, which provides for two years imprisonment for falsely impersonating a Revenue Officer and demanding or receiving money or a valuable thing, i. e., property, in such assumed character, with that of the first clause of Title 18, U. S. Code, Sec. 76, will result in a similar absurdity. It will be noted, too, that although Title 18, U. S. Code, Sec. 123, does not specifically use the words "with intent to defraud," yet, the

Congress did not intend to enact useless legislation, and, by construing Title 18 U. S. Code Sec. 76, in keeping with its express language, to include "intent to defraud" as an essential element of the offense, we can then harmoniously give effect to both statutes, and relegate each to their respective niche in the general program of Federal penal legislation.

If it be said that the gist, the gravamen, the aim, the purpose and reason of the statute was to maintain the good repute and dignity of the Federal service by condemning the false impersonation of Federal authority,[31] and, therefore, (1) every false impersonation comes within the reason of the statute, regardless of the purpose or intent of the impersonator; and (2) every case that comes within the reason of the statute comes within the statute itself, and (3) that the "intent to defraud" is not, therefore, a necessary element of the offense, and may be disregarded in cases where it is absent; our answer is that the statute expressly requires that in addition to the false impersonation there must also be the "intent to defraud," and that the false pose must be for the purpose and with the intent to defraud.

We are not here concerned with the wisdom of the statute, for the right and power to legislate wisely as well as unwisely resides exclusively in Congress, and its only limitations are the boundaries of the Constitution. And the fact that a case may fall within the reason of the statute, or the evil sought to be suppressed thereby, does not justify the Court to embrace acts which are not within

---

requisite acts enumerated in the statute contain all the elements of the "intent to defraud."

To the same effect is the second clause of Title 18, U. S. Code, Sec. 76. The second clause of this statute was leveled at the false impersonator who, with the intent to defraud, demanded or obtained money or property and the first clause of the statute was aimed at the shrewd and cunning false impersonator who, with the intent to defraud a person of money or property, did not resort to bold demands, but operated with finesse. The statute was designed to catch the extortioner as well as the swindler.

31 United States v. Barnow, 239 U. S. 74, 78.

the language of the statute, even though they may involve the same mischief which the statute was designed to suppress. See United States v. Chase, 135 U. S. 255, 261; United States v. Wiltberger, 5 Wheat. 76, 96; Sarlls v. United States, 152 U. S. 570, 575.

In addressing itself to this very question, this Court, in the case of Sarlls v. United States, 152 U. S. 570, 575, said:

> "Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice Marshall when, in the case of United States v. Wiltberger, 5 Wheat. 76, 96, he said: 'To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated.'"

And to like effect are the cases of Denn v. Reid, 10 Pet. 524, 527,[32] and County of Schuyler v. Thomas, 98 U. S. 169, 172.[33]

In United States v. Weitzel, 246 U. S. 533, the argument was made that inasmuch as the offender came within the reason of the statute he should be considered as coming

[32] "But it is not for the court to say, where the language of the statute is clear, that it shall be construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

[33] "These statutes are to be construed as they were intended to be understood when they were passed, twenty years since. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation."

within the letter of the statute. This Court, l. c. 542, 543, said:

> "The argument is not persuasive. * * * Furthermore a casus omissus is not unusual, particularly in legislation introducing a new system. * * * Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive."

II.

The Words "Intent to Defraud," as Used in This Statute, Mean the Intention of Depriving Another of Money or Property by Falsely Posing as a Federal Officer.

There are no common law Federal crimes; all Federal crimes must have their basis in some specific Federal statute. As was succinctly said in United States v. Gradwell, 243 U. S. 476, 485:

> "before a man can be punished as a criminal under the Federal law, his case must be 'plainly and unmistakenly' within the provisions of some statute."

However reprehensible,[34] wrongful or immoral the conduct,[35] if not a violation of a Federal penal statute, it cannot be treated as a crime. And mere expediency, exigency or emergency (Ex parte Milligan, 4 Wall. 2, 121) does not make criminal, that which is not made so by Act of Congress. This fundamental principle of law is the bulwark of a free people against the temptation or inclination of a Government to diminish their rights.

Under our system of government the power of legislation is vested exclusively in Congress, and the duty of

---

[34] "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground." Peckham, J., in France v. United States, 164 U. S. 676, 682.

[35] "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms." Brewer, J., in Todd v. United States, 158 U. S. 278, 282.

interpreting the law resides in the Judiciary. So recent as Pierce v. United States, 314 U. S. 306, this Court, in reversing a conviction under Section 32 of the Criminal Code (18 U. S. C. 76), refused to judicially enlarge the statute by interpretation to include the impersonation of an officer of the T. V. A.[36] (a Government owned and controlled corporation) on the ground that to do so would be an encroachment upon the legislative powers and functions of Congress.

The statute in question used the general words, "with intent to defraud," without defining or otherwise explaining its meaning. To ascertain the meaning intended by the Legislature in such instances, we are relegated to the rules of construction of statutes. Where Congress used general words in a penal statute, such words are to be given their common-law definition (Swearingen v. United States, 161 U. S. 446, 451), and are deemed to have been used in their common-law sense (McCool v. Smith, 1 Black. 459, 469), because our system of jurisprudence is derived therefrom (United States v. Sanges, 144 U. S. 310, 311). Speaking to this very question, Mr. Chief Justice Fuller, in Pettibone v. United States, 148 U. S. 197, 203, said:

> "The courts of the United States * * * resort to the common law for the definition of terms by which offenses are designated."

The word "defraud" is a legal word, has a technical meaning, and is a product of the common law (Curley v. United States, 130 F. 1, 6, 7 [cert. den. 195 U. S. 628]). "Fraud" and its counterpart "defraud" were the original fountain-heads of equity jurisprudence, and the causative factors in the creation and establishment of the Court of Chancery in England. When the Mayflower disembarked

[36] The offense was committed prior to the amendment of Feb. 28, 1938, c. 37, 52 Stat. 83.

its cargo of common law and its shipload of nation builders on the rockbound shores of New England, the law of "defraud" and its meaning and definition became a constituent part of the law of this country.

The word "defraud" is an etymological combination of the words "de" and "fraud." Webster's New Int'l Dict., 2nd Ed., Unab., defines the word "de" as meaning "from; of; out of," and "fraud," as:

> "LAW. An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing, belonging to him, or to surrender a legal right."

The word "defraud" is defined by the same authority, as:

> "To deprive of some right, interest or property, by deceit; to cheat."

The word "cheat" is therein defined as:

> "LAW. The obtaining of property from another by an intentional active distortion of the truth."

Since "intent to defraud" is itself a compound consisting of two sub-elements, (1) the intention to deprive another of property, and, (2) the deceit, it is vitally essential that both sub-elements co-exist, and the absence of either is fatal. To state a falsehood may by itself be entirely harmless, but when accompanied by an intent to deprive another of property, it constitutes the "intent to defraud." On the other hand, the mere intent to deprive another of property may be entirely legitimate, as where one requests a gift of money from another. The request definitely seeks to deprive the other of money, for if the request is granted the donor will part with—be deprived of—money. But when this request is accompanied by a falsehood the "intent to defraud" is complete, even though the donor parts with his money from motives of charity (Com. v. Whit-

comb, 107 Mass. 486; State v. Carter, 112 Iowa 15). It is therefore clear, that both sub-elements must co-exist to spell out the "intent to defraud."

Generally speaking, the falsehood used in the "intent to defraud" may assume any one or more of the multiform artifices conjured up by the ingenious mind of the cunning swindler. But the falsehood itself is but one of the sub-elements of defraudment; it is only the vehicle used in intending to deprive another of property, which together comprise the "intent to defraud." The statute in question affirmatively requires that there be an "intent to defraud," which necessarily includes all the sub-elements thereof, except (for constitutional reasons) it limits the falsehood to a false impersonation of a Federal officer. The practical effect thereof is that generally the "intent to defraud" consists of:

1. Any falsehood; and
2. an intention to deprive another of property;

whereas, by this statute, the "intent to defraud" is made to consist of:

1. A falsehood in the form of a false impersonation of a Federal officer; and
2. an intention to deprive another of property.

In all other respects, the words "intent to defraud" remain intact in the statute, with all its attributes, meaning and implications.

If it should be said that the "intent to defraud" consists in deceiving another by false impersonation, and nothing more, and that it means only an intentionally false impersonation as was said in Reed v. United States, 252 Fed. 21, 24 (C. C. A. 2), our answer is, that the other words of the statute, namely, "*falsely* assume or pretend to be an officer" (italics added), specifically address them-

selves to and embrace that feature of the offense. To falsely pretend is to pretend falsely; the pretension must be intentionally untrue and a falsehood. The purport of the word "falsely" in the statute is to circumscribe the offense to apply to intentional impostors only, for it is conceivable that one may impersonate a federal officer under an honestly mistaken belief that he is a federal officer. As for instance, where one has been duly nominated by the President of the United States for the office of Federal Judge and such nomination has received the requisite consent of the Senate, but before his commission is actually signed by the President (Marbury v. Madison, 1 Cranch 137, 156), he assumes his office as Federal Judge (under the mistaken belief that the Senatorial approval completes his appointment), acts as such and receives the salary thereof. Concededly, the statute would not operate on him, because in the supposed case the element of falsity in the impersonation was absent.

Reed v. United States, 252 Fed. 21 (C. C. A. 2), was a case where the defendants were charged with false impersonation with intent to defraud naval deserters, and the overt act was the arresting of such naval deserters. It appears that the arrest was made for the purpose of collecting the Government reward. It was not charged that the Government was to be defrauded out of the reward, but that the naval deserters were to be defrauded. Recognizing that "intent to defraud" was an element of the statute, l. c. 23, 24, but finding itself at a loss to explain how or of what the naval deserters were to be defrauded, Justice Manton, speaking for the Court, l. c. 24, illogically reasoned that:

> "The fraud was committed against the enlisted men, and consisted in telling these enlisted men of the Navy that Reed was a captain of the 'Navy' and Eaton a 'lieutenant' or other employe of the federal government."

If the "intent to defraud" merely consists of the falsehood that is inherent in every false impersonation, then it has no place in the statute and is pure surplusage. But we have demonstrated above that Courts must not lightly delete words from a penal statute. As a matter of simple definition and of elementary law, the words "fraud" and "defraud" mean the obtaining of property of another by a falsehood. The falsehood is not the intent to defraud; it is merely one of the elements thereof, the vehicle used to effect the defraudment. Shortly after the decision in the Reed Case, supra, Congress enacted a statute[36] specifically making false impersonation and arresting a person a misdemeanor. The decision in the Reed Case was clearly fallacious and has been totally ignored by all the Courts.[37]

The words "intent to defraud" or "defraud" as used in the statute in question, have never been squarely before our courts for definition or interpretation, and there is no reported case dealing squarely with this element of the offense. However, the dicta in Lamar v. United States, 241 U. S. 103; United States v. Barnow, 239 U. S. 74; Pierce v. United States, 314 U. S. 306, and the opinions of the various Circuit Courts of Appeals (except Reed v. United States, 252 Fed. 21) in cases involving the first clause of the statute assume, as a matter of law, that the words "intent to defraud" in the statute mean the intention to deprive another of money or property.

There is a plethora of state decisions defining the words "defraud" and "intent to defraud," all unanimously holding that they respectively, mean the deprivation or intention to deprive another of property by deceit. The Federal decisions define the word "defraud" as used in Federal criminal statutes, as meaning the causing of pecuniary or property loss by fraudulent means (United States v. Cohn,

[36] Act of Nov. 21, 1921, c. 134, Sec. 6, 42 Stat. 224, 18 U. S. C. 77, now 18 U. S. C. 77a.

[37] The Reed Case has never been cited or referred to in the reported cases.

270 U. S. 339, 346, 7; Hammerschmidt v. United States, 265 U. S. 182, 188; Curley v. United States, 130 F. 1, 9), but, as used in Title 18, U. S. Code, Sec. 88, it means the interference with or obstruction of one of the lawful governmental functions of the United States by deceitful means (United States v. Cohn, 270 U. S. 339, 346; Hammerschmidt v. United States, 265 U. S. 182, 188; Curley v. United States, 130 F. 1, 10). This latter or secondary meaning of the word "defraud" has application solely to conspiracies to defraud the United States (18 U. S. Code Sec. 88), because of the peculiarly broad language of that statute (United States v. Cohn, 270 U. S. 339, 346), which extends broadly to every conspiracy

> "to defraud the United States in any manner and for any purpose"

with no words of limitation whatsoever.

We must keep in mind that the indictment in the case at bar charges an intent to defraud Mrs. Silk—not the United States—and that the intent to defraud relates to a pecuniary or property loss sustained or sought to be sustained by Mrs. Silk.

In Curley v. United States (C. C. A.), 130 F. 1 (cert. den., 195 U. S. 628), the defendant was charged with the violation of Title 18 U. S. Code Sec. 88, for conspiring with another to defraud the United States by falsely impersonating his co-conspirator at a civil service examination. The defense was that the United States was not defrauded by defendant's act, and the case turned on the meaning of the word "defraud" as used in that particular statute. In affirming the conviction the Court, l. c. 6, said:

> "Quite likely the word 'defraud' as ordinarily used in the common law, and as used in English statutes and in the statutes of our states, enacted with the object of protecting property and property rights of

communities and individuals, as well as of municipal governments, which exist largely for the purpose of administering local financial affairs, has reference to frauds relating to money and property."

And again, on page 9, the Court said, what is particularly appropos to the case at bar:

> "The limited sense in which the word 'defraud' was sometimes used in the older statutes had reference to the protection of personal and individual property rights, as for instance, 'If any person shall defraud another,' etc. That kind of legislation results, of course, from the purpose of the local government to protect the individual in his natural and fundamental right to enjoy liberty and acquire property."

In principle, the foregoing quotation fits the statute involved in the case at bar. Nor is it altered by the fact that the statute also denounces attempts to defraud the United States; the charge laid is the attempt to defraud Mrs. Silk, a person, and not the United States.

In closing the opinion the Court, l. c. 12, said:

> "The purpose of the conspiracy here was • • • to secure the statutory pay intended by the government as compensation for an official answering the requirements and qualifications of the law; and in this sense surely the object of the conspiracy had reference to money and property of the government."

In Hammerschmidt v. United States, 265 U. S. 182, the defendants were charged with the violation of Title 18 U. S. Code Sec. 88, by conspiring to defraud the United States by impairing, obstructing and defeating a lawful function of the Government, by circulating handbills designed to advise and procure persons subject to the Selective Service Act to refuse to obey it. Demurrers to the indictment were overruled, and conviction followed. In reversing the trial court, this Court observed that the

handbills openly, frankly and boldly advised persons not to obey the Draft Act, and consequently the element of deceit in "defraud" was absent. The opinion then discussed the meaning of the word "defraud" in its primary and secondary sense, l. c. 188:

> "To conspire to defraud the United States means primarily to cheat the government out of property or money; but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. It is true that the words 'to defraud' as used in some statutes, have been given a wide meaning—wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes."

It seems that in Horman v. United States, 116 Fed. 350, the words "scheme" and "defraud" in Title 18 U. S. Code Sec. 338 (using the mails to defraud statute), had been given a meaning that this Court felt was inharmonious with the law, and in addressing itself to the Horman Case, supra, Mr. Chief Justice Taft, speaking for this Court in the Hammerschmidt Case, l. c. 188, 189, said:

> "The decision, however, went to the verge, and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose."

In United States v. Cohn, 270 U. S. 339, the defendant was charged with violating Title 18 U. S. Code Sec. 80, in that with intent to defraud the United States he made

a false statement and claim to the U. S. Collector of Customs, and thereby obtained possession of a tax-free shipment of cigars. The cigars were shipped from the Philippines and was consigned to the defendant, but the bill of lading with a draft attached for the price of the cigars, was sent to a local bank with instructions not to deliver the bill of lading to defendant, except upon payment of the draft. Notwithstanding that he knew that the bank held the bill of lading subject to the payment of the draft, the defendant made a claim with the U S. Collector of Customs for the possession of the cigars, falsely stating that the bill of lading had not yet arrived, but would be delivered to the Collector upon its arrival. Relying on these representations the Collector turned over the cigars to the defendant.

The defendant contended that since these cigars were tax exempt the obtaining the cigars from the Collector, albeit by false claims and statements, did not operate to defraud the United States of any money or property. The District Court sustained a demurrer. The Government contended that the word "defraud" in the statute was used in its secondary sense, and did not relate to a pecuniary or property loss to the United States. In denying the Government's contention and affirming the action of the District Court this Court said, l. c. 345:

> "Under these Regulations, Cohn was not entitled to enter and obtain possession of the cigars until he had paid the draft and become the holder of the bill of lading. But even so, the acts by which possession of the cigars were obtained did not constitute an offense against the United States unless done * * * for the purpose of 'defrauding' the government."

In limiting the so-called secondary meaning of the word "defraud" to violations of Title 18 U. S. Code Sec. 88 only, this Court said, l. c. 346:

"Neither is the wrongful obtaining of possession of such non-dutiable merchandise a 'defrauding' of the government, within the meaning of the statute. It is contended by the United States that, by analogy to the decisions in Haas v. Henkel, 216 U. S. 462, 479, 54 L. ed. 569, 577, 30 S. Ct. Rep. 249, 17 Ann. Cas. 1112, and Hammerschmidt v. United States, 265 U. S. 182, 188, 68 L. ed. 968, 970, 44 S. Ct. Rep. 511, and other cases involving the construction of Sec. 37 of the Penal Code relating to conspiracies to defraud the United States, the word 'defrauding' in the present statute should be construed as being used not merely in its primary sense of cheating the government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy 'to defraud the United States in any manner and for any purpose' and with no words of limitations that can be implied from the context. Section 35, on the other hand, has no words extending the meaning of the word 'defrauding' beyond its usual and primary sense. On the contrary it is used in connection with the words 'cheating or swindling,' indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss."

This decision is the latest expression of this Court on the interpretation and meaning of the word "defraud" as used in Federal criminal statutes, and, by clear implication, the word "defraud", as used in Title 18, U. S. Code, Sec. 76, relates to pecuniary or property loss.

Nor is there any merit to the suggestion that a different rule should apply, because this statute appears in the chapter assigned to "Offenses Against Operations of Govern-

ment" in the U. S. Code. The re-arrangement of statutory provisions in the process of codification leaves their meaning unaffected. Hale v. Iowa State Board, 302 U. S. 95, 102. As was tersely said in Warner v. Goltra, 293 U. S. 159, 161:

> "The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread. 1-4 U. S. C., Sec. 2a, 44 Stat. at L., pt. 1, p. 1."

Neither is there any merit to appellant's suggestion that the word "defraud" ought to be construed so as to include a benefit to the accused, even if there be no consequent loss to the victim. But the statute is addressed not to whoever may benefit, but to whoever seeks "to defraud—a person," and the question is not whether the accused benefited, but rather, was the victim defrauded? And this is so, even if the accused has not gained, so long as the victim has been defrauded. See, Goldsmith v. Kopman, 140 Fed. 616, 621; United States v. Barnow, 239 U. S. 74, 80.

III.

The Oral Information Sought From Mrs. Silk, as to the Whereabouts of Abe Zaidman, Is Neither Money nor Property, and Consequently Is Not Subject to Defraudment.

Perhaps the clearest and most comprehensive definition of property is found in Ludlow-Saylor Wire Co. v. Wallbrinck, 275 Mo. 339, 205 S. W. 196, l. c. 198, as follows:

> "In law and in the broadest sense 'property' means 'a thing owned,' and is, therefore, applicable to whatever is the subject of legal ownership. It is divisible into different species of property, including physical things, such as lands, goods, money; intangible things, such as franchises, patent rights, copyrights, trade-

marks, trade-names, business good will, rights of action, etc. In short it embraces anything and everything which may belong to a man and in the ownership of which he has a right to be protected by law."

It is important to determine whether or not the information as to the whereabouts of Abe Zaidman was a property or property right of Mrs. Silk. The information in question related to the existence of a fact—the fact of the whereabouts of Abe Zaidman. The place where Abe Zaidman resides is a matter of fact, and the information thereof would be a statement of fact. We contend that mere facts, news, information or intelligence, as such, is not the subject of private ownership or property, but is in the realm of public domain. As is said in 13 Corpus Juris (Copyright & Lit. Prop.), Sec. 21, p. 956:

"The facts and information themselves are not the subject of private property, and cannot be withdrawn from public use by reason of their collection and statement by any person."

In Davies v. Bowes, 209 F. 53 (D. C. N. Y.), the plaintiff brought an infringement suit, alleging that the defendant pirated the information contained in his copyrighted news item. A demurrer to the bill was sustained, on the ground that the copyrighted item purported to be a recital of news or facts, and that news or facts are public property, and plaintiff did not have a proprietary right or interest in the news or facts, as such.

In International News Service v. Associated Press, 248 U. S. 215, it was said that news or information, not the result of a literary, dramatic, musical or other artistic creation, is public or common property, and that no one individual has a property or property right in such news or information, as such. Mr. Justice Pitney, speaking for the Court, l. c. 234, said:

"In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it. • • • But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are public juris."

Mr. Justice Holmes, in a concurring opinion, l. c. 246, said:

"• • • there is no property in the combination or in the thoughts or facts that the words express."

Mr. Justice Brandeis, in explaining why there can be no property in news or information, as such, pointedly said, l. c. 250, 251:

"An essential element of individual property is the legal right to exclude others from enjoying it. • • • The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property."

Mr. Justice Brandeis reasoned that if there is no property in news or information, as such, there could be no unlawful taking thereof, l. c. 258:

"Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him."

The essential element of property, that of ownership and the lawful right to exclude others from enjoying one's property, is entirely wanting in the case at bar. Mrs. Silk may or may not have known Zaidman's whereabouts, but, in the very nature of things, there were others who

also knew it; his neighbors, his landlord, his friends and he himself necessarily had this information. However, none could claim ownership to this information, for its very nature was not subject to dominion or ownership, nor could anyone exclude others from learning it.

What we read, what we see, what we hear comprises the totality of our knowledge, yet our knowledge, per se, is not a property in the juridical sense. It may enable us to write books, compose melodious music, paint masterpieces, and produce other articles of property, but the information or knowledge, as such, is not a property.

Let us assume for the sake of argument that Mrs. Silk had actually furnished the defendants with the information sought; yet, neither in the legal sense nor in the economic sense, would the defendants have received any property, nor would Mrs. Silk have given up or lost any property. It is no solace to the Government that the defendants by the use of such information might induce Zaidman to pay his bill, and in that sense produce property by means of said information, for the law does not concern itself with remote possibilities. The charge laid against defendants in the indictment is not that the defendants might produce an item of property by the aid of the information, but that it—the information—the thing demanded of Mr. Silk, is, of and by itself, an item of property. We have demonstrated beyond cavil that the information sought from Mrs. Silk was not an item of property, even though it may be the means of producing property. If the information sought from Mrs. Silk was not property in the legal sense there could be no intention to deprive Mrs. Silk of property, and the element of the intent to defraud Mrs. Silk is absent.

Let us suppose that the defendants falsely posed as Federal officers and demanded of Mrs. Silk, not the whereabouts of Abe Zaidman, but information as to the correct time or the condition of the weather. The legal situa-

tion presented in the supposed case is not different from the case at bar, for both affirmatively lack the idea of defrauding Mrs. Silk out of an item of property. The most that can be said about the case at bar is that the defendants sought from Mrs. Silk an item that was neither property nor a subject of defraudment. For cases under the various state false pretense statutes, where the item sought to be defrauded was held not to be a property and not subject to defraudment, see State v. Towers, 122 Kan. 165 (extension of time to pay a matured debt); State v. Clay, 100 Mo. 571 (an invalid option of real estate and invalid power of attorney); State v. Martin (Mo. App.), 151 S. W. 504 (a credit entry on the books of his creditor); Robinson v. State, 53 N. J. L. 41 (signature to a voidable contract).

It would seem from a review of the decisions of the various state courts construing the false pretense statutes, that the only item or thing subject to defraudment is such property as may be the subject of larceny, and that mere personal benefits, conveniences, advantages or information that do not rise to the dignity of property, is not included.

Since the information in question was not the subject matter of property, it results that the defendants did not seek to defraud Mrs. Silk of any property, and an essential element of the "intent to defraud" is wanting.

IV.

The Overt Act Required by the Statute Relates to the "Intent to Defraud," and Must Be an Act Committed in Pursuance Thereof, and Sufficiently Associated Thereto, as to Convert the Fraudulent Intent Into a Fraudulent Attempt.

A crime consists of two major elements, the intention to do an unlawful act, and the actual doing of the act. The intent is the mere mental thought; the act is the overt con-

duct aimed at accomplishing this intention. The intent is the guiding lamp that directs the overt act. The offense is complete when the intent is converted into an attempt, i. e., when the overt act is done pursuant to the intent and is aimed at accomplishing it.

The statute in question was aimed at the swindlers and the extortionists and their nefarious practice of impersonating federal officers with the intent and purpose of cheating persons of their money and property. The statute operates alike upon the successful as well as the unsuccessful cheat. Congress used apt words to embrace the activities of the extortionist.[38] But the cunning and shrewd swindler does not stoop to extortion, he resorts to finesse. With a view to embrace the multiform artifices conjured up by the ingenious mind of the cunning swindler, Congress used the general words "and shall take upon himself to act as such."[39] The structure of the statute, presupposes the following natural sequence of events, first, an intent to defraud, second, a false impersonation of a Federal officer, and third, the commission of the overt act. All three must co-exist or no offense is committed.

Since the statute contemplates the existence of both the intent to defraud and the false impersonation before the overt act is committed, the words "shall take upon himself to act as such" necessarily relate to the subject matter preceding the overt act. This contemplates a person who intends to defraud another by means of the false impersonation. The office of an overt act is to transform the intent into an attempt. Since the only intent contemplated by the statute is an intent to defraud, it would seem that the overt act in the statute is addressed to transforming the intent to defraud into an attempt to defraud, of course, by means of the false impersonation.

---

[38] ". . . demand or obtain from any person . . . ." Second clause of Sec. 32 of the Criminal Code (18 U. S. C. 76).

[39] First clause of Sec. 32 of the Criminal Code (18 U. S. C. 76).

The act must be committed in pursuance of and sufficiently associated to the fraudulent intent, but falling short of actual consummation of the defraudment, and possessing, except for the failure to consummate, all the elements of defraudment, so that, absent the failure to consummate, it would have resulted in actually obtaining the property of another by false impersonation.

To this general effect is Lamar v. United States, 241 U. S. 103, where this Court, in discussing the requisite overt act, said, l. c. 114:

> "• • • when rightly construed, the operation of the cl use is to prohibit and punish the falsely assuming or pretending, with intent to defraud the United States or any person • • • and the doing in the falsely assumed character any overt act • • • to carry out the fraudulent intent."

And in United States v. Barnow, 239 U. S. 74, the Court said, l. c. 77:

> "But to take upon himself to act as such means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense."

We assume the Court had in mind an act done in keeping with the pretense to carry into execution the fraudulent intent. At any rate, the Court in the Lamar Case, supra, made it plain that the requisite overt act must be done to carry out the intent to defraud another. It would seem then, that an overt act not done to carry into execution the intent to defraud another, is not an overt act within the meaning of the statute.

V.

The Indictment Charging an Overt Act Must Recite the Facts Comprising the Overt Act.

The indictment in the case at bar did recite the facts from which the Government concluded that an overt act under the statute was committed, and we have no quarrel with the full recital of the particulars of that allegation. But appellant anticipated that we would contend, as we most certainly do contend, that the allegations charging the overt act affirmatively negatives an intent to defraud and therefore the indictment is not valid; and to combat this contention, the appellant in its brief seeks to press upon this Court the argument that a mere general statement in the indictment that the defendants took upon themselves to act as such pretended officers, without more, would satisfy the statute, and that, therefore, the actual recital of what such overt act consisted of is pure surplusage and should be now disregarded.

The applicable law on the subject of a factual recital of the essential elements in indictments is so clear that we would seem presumptious indeed, to argue this point at length, except for appellant's apparent seriousness. That the overt act is an essential element of the offense in the case at bar is unquestioned.

Relevant to this discussion is the appropriate remarks of Mr. Chief Justice Waite in United States v. Cruikshank, 92 U. S. 542, l. c. 558:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, it must descend to particulars."

The reports are replete with cases holding that the overt act must be factually described, so that the accused may be advised of the essential particulars of the charge against him, and enable the Court to determine whether the facts alleged constitute an overt act under the statute. See United States v. Cruikshank, 92 U. S. 542, 558.

The appellant cites Lamar v. United States, supra, and Pierce v. United States, supra, in support of their contention. A reading of those cases disclose that they are not authority for that proposition of law. In those cases, the Court merely summarized the indictments for the sake of brevity, and the context of the summaries would lend support to the view that the overt acts were fully and amply alleged.

VI.

Indictments Charging Fraudulent Conduct Must Recite the Facts That Comprise the Fraudulent Conduct and General Allegations Are Insufficient.

We raise this question as a prelude to the next point in this brief, that the words specifically charging the overt act is the only place in the indictment which described the thing Mrs. Silk was sought to be defrauded, and that such description was intended to serve, as indeed it does serve, two purposes in the indictment, namely, a recital of the facts comprising the overt act, and a description of the thing Mrs. Silk was sought to be defrauded.

We are mindful of the expressions appearing in the reports, to the effect that an intent may be generally alleged (Evans v. United States, 153 U. S. 584, 594), notwithstanding that the cases, including the Evans Case, supra, hold that general allegations of fraud in an indictment or in a bill of equity, without stating the factual particulars comprising the fraud, are insufficient. There is a clear distinction between the intent, i. e., the mental thought, and the

overt acts comprising the fraudulent conduct. The intent may be generally alleged, it is true, provided only that the fraudulent conduct, i. e., overt acts, are so particularized in the indictment, as to denote or signify the intent with which they were done. This is so because the thief does not shout his intentions from the house-tops; his criminal intention is his personal secret, and he conceals it safely in his breast. His intent, therefore, is virtually incapable of direct proof, and we are relegated to a scrutiny of his actions to determine circumstantially, whether or not such intent was present. But absent the requisite particularization of the fraudulent conduct, the general allegation of intent is mere color and insufficient. The rule is correctly stated in United States v. Hess, 124 U. S. 483, 487:

> "The doctrine invoked by the solicitor-general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute **may** be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

Fraud is a legal inference arising from certain stated facts, and is a mere conclusion of the legal effect of such stated facts. But what may appear to be a fraud to a prosecuting official may not be a fraud at law; and unless the conduct allegedly comprising the fraud is factually particularized in the indictment, the defendant will not be apprized of the specific charge against him, nor will the Court be able to determine, on demurrer, whether the facts stated constitutes a violation of the statute. Thus an innocent accused may be shuttled completely through the labyrinth of a trial before the Court can determine that the facts charged against him do not constitute a crime.

And so the fringe of our rights become frayed. This thought is aptly expressed in Rice v. Ames, 180 U. S. 371, 374:

> "A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion."

However else our Courts may treat general allegations of fraud in criminal indictments, they seem to be meticulous in requiring specific factual statements of fraud in civil pleadings. We know of no rule of law or of nature that suggests that property rights are to be treated more tenderly than natural rights.

In Alabama v. Burr, 115 U. S. 413, a demurrer to a declaration was sustained below, and, in affirming said action, this Court, l. c. 426, said:

> "Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad."

In Fogg v. Blair, 139 U. S. 118, a demurrer to a bill of equity was sustained, and, in affirming, this Court, l. c. 127, said:

> "As he impugned the good faith of the transactions between the company and the contractors, it was incumbent upon him to state the essential ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was 'colorable,' a 'fraud,' a 'breach of trust,' a 'scheme' by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit."

In Chamberlain Machine Works v. United States, 270 U. S. 347, this Court, in affirming the sustention of a demurrer to a petition in a civil case, pointedly said, l. c. 349:

> "The general allegations of 'fraud' and 'coercion' were mere conclusions of the pleader; and were not admitted by the demurrer. Fogg v. Blair, 139 U. S. 118, 127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476. To show a cause of action it was necessary that the petition state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they were perpetrated with such definiteness and reasonable certainty that the Court might see that, if proved, they would warrant the setting aside of the settlement." (citing cases) "The petition contained no such specific allegations; and since its vague and general averments did not overcome the effect of the release, the demurrer was properly sustained."

And to the same effect is St. Louis, K. & S. E. R. Co. v. United States, 267 U. S. 346; Cairo, T. & S. R. Co. v. United States, 267 U. S. 350; Perkins-Campbell Co. v. United States, 264 U. S. 213; Dillon v. Barnard, 21 Wall. 430; Ritchie v. McMullen, 159 U. S. 235.

Cases in which demurrers were sustained because the pleading stated conclusions and not facts, seem to be more plentiful on the civil side than on the criminal side, and the judicial insistence on factual recitals seem to be more vehement in civil cases. Nevertheless, if such is the rule in civil cases, a fortiori, it is the rule in criminal cases. When we paraphrase the foregoing quotations to fit the criminal case, it results in the requirement that the indictment must particularize the facts which comprise the fraud or defraudment.

VII.

The Allegation Charging the Overt Act Serves Two Purposes in the Indictment, a Recital of the Facts Comprising the Overt Act, and a Description of That Which Mrs. Silk Was Sought to Be Defrauded. Since Information as to the Whereabouts of a Third Person Is Not Property, nor a Subject of Property, It Is Not a Subject of Defraudment. The Indictment, Therefore, Affirmatively Negatives an Intent to Defraud, and Does Not State an Offense.

The appellant's position seems to be that, inasmuch as the indictment merely charged the intent to defraud generally, without describing what the defendants sought to obtain from Mrs. Silk by the false impersonation, and the overt act, for aught that appears, they might have sought to defraud her of property. This might be so, if it were not for three distinct valid reasons.

Firstly, the general allegations of intent to defraud is no allegation of fact and raises no issuable fact, and if the indictment does not recite that the defendants sought to defraud Mrs. Silk of something, it would be consistent with their innocence and tantamount to a charge that they did not seek to defraud Mrs. Silk, and the indictment would fail.

Secondly, upon the authority of West Ohio Gas Co. v. Public Utilities Comm., 294 U. S. 63, 70, and United States v. California Co-op. Canneries, 279 U. S. 553, 555, this Court judicially notices that on page 2 of the Transcript of Record in this case, in the second count of the indictment, the defendants are charged alternatively to the charge in count one of the indictment,[40] with seeking to defraud Mrs. Silk of

[40] The indictment charges the same identical act in two separate counts, count one under the first clause of the statute, and count two under the second clause of the statute. There could be but one punish-

> "a valuable thing, to-wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman" (R. 2).

That is the very same information that the defendants sought from Mrs. Silk in the first count. There being no other statement in count one of the indictment describing that which the defendants sought to defraud Mrs. Silk, and, aided as we are by the data disclosed by the second count, it would seem to result that the statement in count one of the indictment, namely, "information of and concerning Abe Zaidman," describes the thing which the defendants sought to defraud Mrs. Silk.

Thirdly, the statement in count one:

> "demanding of and from the said Mrs. Silk that she give the defendants information of and concerning the whereabouts of one, Abe Zaidman" (R. 2),

describes both the overt act and the thing which the defendants sought to defraud Mrs. Silk. We have demonstrated above that the overt act must be aimed at executing the intent to defraud, and this construction of the foregoing-quoted phrase from count one, is in consonance therewith. The effect of this allegation is, that the general allegation of intent to defraud is accordingly modified by the specific designation, so that the charge is, the false impersonation with intent to defraud Mrs. Silk of information of and concerning the whereabouts of Abe Zaidman, and the overt act is the demanding of such information from Mrs. Silk. This is in accord with the expression appearing in Dunbar v. United States, 156 U. S. 185, 190:

> "* * * the entire indictment is to be considered in determining whether the offense is fully stated."

ment for the same singular act though condemned by both clauses of the statute, because the same identical evidence that will establish a violation of the first clause will also establish a violation of the second clause of the statute. Burton v. United States, 202 U. S. 344, 381; Gavieres v. United States, 220 U. S. 338, 343; Ebeling v. Morgan, 237 U. S. 625, 631.

In that view of the matter, it would seem that, since the information sought from Mrs. Silk was not property, nor a subject of property, nor was it a subject of defraudment, the effect of the allegation was to negative the intent to defraud and render the indictment invalid. This principle is not new. It was very aptly stated in United States v. Corbett, 215 U. S. 233, l. c. 244, as follows:

> "It is, of course, to be conceded that where the facts charged to have been done with criminal intent are of such a nature that on the face of the indictment it must result as a matter of law that the criminal intent could not under any possible circumstances have existed, the charge of such intent, in general terms, would raise no issue of fact proper to go to a jury."

And such is the situation in the case at bar.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the construction placed upon Section 32 of the Criminal Code, as amended (18 U. S. C. 76), by the District Court, was correct; that the first count of the indictment fails to allege a violation of that statute; and that the judgment sustaining the joint demurrer to count one of the indictment be affirmed.

HENRY S. JANON,
Attorney for Appellees.

No. 629.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE UNITED STATES OF AMERICA,
Appellant,

v.

PHILIP LEPOWITCH and MARVIN SPECTOR,
Appellees.

On Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

APPELLEES' PETITION FOR REHEARING
and
SUGGESTIONS IN SUPPORT.

HENRY S. JANON,
Attorney for Appellees.

INDEX.

Cases Cited.

Textbooks Cited.

Statutes Cited.

Miscellaneous.

No. 629.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE UNITED STATES OF AMERICA,
Appellant,

v.

PHILIP LEPOWITCH and MARVIN SPECTOR,
Appellees.

On Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

APPELLEES' PETITION FOR REHEARING.

To The Honorable The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now petitioners Philip Lepowitch and Marvin Spector, appellees in the above entitled proceeding, and petition this Court to grant them a rehearing, and as grounds therefor, petitioners respectfully represent:

1. The judgment, decision and opinion of this Court is erroneous, and manifested a misapprehension and misunderstanding of the law in the case, in the following respects, to-wit:

(a) That portion of the Court's opinion, to-wit:

> "We hold that the words 'intent to defraud' in the context of this statute, do not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct".

is contrary to the manifest intention of Congress in enacting the statute in question, and in using the words "intent to defraud" therein.

(b) That portion of the Court's opinion, to-wit:

> "The first clause of this statute, the only one under consideration here, defines one offense; the second clause defines another. While more than mere deceitful attempt to affect the course of action of another is required under the second clause of the statute, which speaks of an intent to obtain a 'valuable thing', the very absence of these words of limitation in the first portion of the act persuade us that under it, a person may be defrauded although he parts with something of no measurable value at all".

is erroneous, and is based on a misunderstanding of the statute, and upon an erroneous analytical comparison of both clauses thereof.

(c) That portion of the Court's opinion, to-wit:

> "In any case, this branch of the statute covers the acquisition of information by impersonation although the information may be wholly valueless to its giver. This result is required by United States v. Barnow, supra, 80, in which we held that the purpose of the statute was 'to maintain the general good repute and dignity of the (government) service itself', and cited with approval cases which, interpreting an analogous statute, said: 'It is not essential to charge or prove an actual financial or property loss to make a case under

the statute.' Haas v. Henkel, 216 U. S. 462, 480; United States v. Plyler, 222 U. S. 15".

is not applicable to the case at bar, nor to the statute in question, and the analogy made therein is erroneous.

(d) The Court encroached upon the legislative powers of Congress, by distorting the meaning of the statute and effectually amended and re-wrote same.

(e) That portion of the Court's opinion, to-wit:

> "The District Judge sustained a demurrer to the indictment, holding that the conduct of the defendants, 'while highly reprehensible, does not come within the terms of the statute'. He apparently concluded that the count of the indictment under consideration did not, within the meaning of the statute, make sufficient allegations either of impersonation or of acting with intent to defraud".

is an erroneous statement of the jurisdictional basis for review by this Court, but rather, the jurisdiction of this Court should have been based on the following portion of the District Court's opinion, to-wit:

> "The action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not in my opinion taking upon themselves to act as Federal Bureau of Investigation agents". (R. 6)

and this Court assumed and exercised unwarranted jurisdiction in this case, over and beyond the strict limitations of the Criminal Appeals Act.

WHEREFORE, the premises considered, appellees pray this Court to grant them a rehearing.

HENRY S. JANON,
Attorney for Appellees.

Certificate of Counsel.

I hereby certify that this Petition for Rehearing is not presented for the purpose of delay, but is presented in good faith for the reasons mentioned therein.

HENRY S. JANON,
Attorney for Appellees.

SUGGESTIONS IN SUPPORT OF APPELLEES' PETITION FOR REHEARING.

1.

Appellees are completely shocked by the Court's decision. The opinion and the reasoning used by the Court to sustain its decision in this case, are so palpably fallacious, that we prefer to attribute that to the undue haste with which this Court acted in writing its opinion in this case.

Appellees have the utmost respect for this Court, but we realize that the members thereof are mere human beings and subject to the frailties of the flesh, including that of falling into error. If we should seem somewhat impolitic in criticising what to us appears to be an error of the Court, we confess that our limited talents do not include the ability to express criticism in the silky language of the diplomats who "fritter away weighty matters with niceties of words".

We believe with every fiber in our bodies that the Court has made a grievous error in its decision and opinion in this case, and we aver that this petition is not filed as a mere perfunctory routine. We naively believe that if the Court should be satisfied that it has erred in this case, that it will grant appellees a rehearing.

(a) **The Intention of Congress With Respect to the "Intent to Defraud".**

(b) **Analysis of Both Clauses of the Statute.**

Because points (a) and (b) are necessarily bound up with each other, we felt it preferable to join them together in the argument.

Under our system of government, the power to make laws is vested exclusively in Congress, and the function of the Court is to construe or interpret the law, as enacted by

Congress. Since it is the Act of Congress that is to be construed or interpreted, the duty of the Court is to ascertain the intention of Congress in enacting the law, and such intention determines the construction or interpretation of the law.

The statute in question was originally offered in Congress in 1883 but was finally enacted in 1884, and we must needs recur to the history of the times, to ascertain what was the intention of that Congress in enacting this statute. The legislative history reports that pension claimants were being cheated and blackmailed by prowling bandits who falsely posed as federal officers (15 Cong. Rec. 2256, 48th Cong. 1st sess.). In that state of condition, two bills were offered in Congress, one on February 24th, 1883, making it a misdemeanor to merely impersonate a federal officer and act as such (S. 2506, 47th Cong. 2nd sess., 14 Cong. Rec. 3239), and the other on February 26, 1883, making it a felony to (1) impersonate a federal officer and do an overt act for the purpose of defrauding another, or, (2) impersonate a federal officer and in such pretended character, demand or obtain money, paper, document or other valuable thing (C. 2507, 47th Cong. 2nd sess., 14 Cong. Rec. 3263). The misdemeanor bill died an ignominious death, whereas the felony bill passed the Senate, but did not reach the House before Congress adjourned sine die (15 Cong. Rec. 1285). In the next session of Congress (48th Cong. 1st sess. 1884), the felony bill was again offered and passed both Houses of Congress in rapid order and was signed by the President on April 18, 1884 (15 Cong. Rec. 3368).

The felony bill (now Title 18 U. S. Code, Sec. 76) is in two clauses, the first clause thereof was addressed to criminal activities of a basically fraudulent nature, and used the apt legal words "with intent to defraud" to describe and embrace such fraudulent activities which include embezzlement, so-called larceny by trick and others of a basically fraudulent nature. The second clause on the

other hand, was addressed to criminal activities of an affirmative nature not basically fraudulent, and used the apt words "demand or obtain" to describe and embrace affirmative criminal activities of a nature not basically fraudulent and which do not fall within the definition and meaning of "defraud" (See Fasulo v. United States, 272 U. S. 620, 628; Hammerschmidt v. United States, 265 U. S. 182, 188), such as extortion, robbery, burglary and larceny (if it is legally possible for an impersonator to rob, burglarize or larceniously "demand or obtain" a thing "in such pretended character", on which query we express no opinion) and is not violative of the first clause. (As an aside, we might say that every such demand or obtainment in the pretended character of a federal officer is a demand or obtainment under color of the pretended office, and constitutes an extortion.) The two clauses and the offenses created therein do not overlap each other; they are alternative clauses each mutually excluding the other, and artfully designed to reach every impersonator who uses the false pose to get or seek to get a thing from the victim.

It should be noted that the first clause specifically uses the words "with intent to defraud", whereas the second clause specifically omits any reference to those words. If Congress had desired to make the two clauses and the offenses created thereby inter-related (as this Court seemed to think), it would have been a simple matter for Congress to have said:

> "or shall in such pretended character, **and with such intent**, demand or obtain" etc.

But to do so would make the second clause an atrocious absurdity, because, to defraud is not to extort, and to extort is not to defraud (Fasulo v. United States, supra, 628). The very idea of defraudment is to get or seek to get a thing by misplaced confidence, cheat, swindle, chicanery, trickery or some surreptitious manner (Hammerschmidt

v. United States, supra, 188). Whereas, the very idea of extortion is to demand or obtain a thing by brazenly bold demands, threats, force, torture, coercions, violence, intimidation or the like. Defraud is the very antonym, the very antithesis of extortion; the one denotes beguilement, the other denotes brazenness. This Court in the case of Fasulo v. United States, supra, 628, recognized the irreconcilable difference between defraudment and extortion, and held that the using the mails to defraud statute (18 U. S. C. 338) was not violated by one who used the mails to blackmail or extort money from another.

Let us examine why Congress chose the particular words used in each clause to designate separate offenses, and what it sought to accomplish thereby. This Court correctly stated the elements that comprise the first clause as,

> "impersonation of an officer of the government and acting as such with intent to defraud either the United States or any person".

The crime is completed when the impersonator acts with the intent to defraud another. The act is the overt step taken by the offender to put into execution his intention to defraud. The offense is complete and the first clause of the statute is satisfied whether the act accomplished its purpose and the victim actually defrauded, or whether the act failed of accomplishment, or whether the offender was apprehended in the act before the victim was actually defrauded. In creating the defraud clause, Congress aptly used the words "with intent to defraud" and followed same with the words "act as such" i. e. act to defraud in the pretended character, to embrace every conceivable method or means used in defrauding or attempting to defraud another.

The defraudment clause of the statute being complete, Congress then turned to the business of writing the second clause. It must be assumed that Congress knew the differ-

ence between defraudment and extortion, and that it also knew that an extortionist could not be convicted under the defraudment clause of the statute. See Fasulo v. United States, supra, 628, where it was said:

> "But broad as are the words 'to defraud' they do not include threat and coercion through fear or force."

In writing the second clause, Congress purposely omitted the words "with intent to defraud" or any reference thereto. It could be no part of the second clause without mutilating it. Congress aptly used the words "demand or obtain" in the second clause to embrace the criminal activities not described in the first clause. Defrauders do not "demand"; they are subtle confidence men, and a demand by them would convert their offense from that of defraudment to that of extortion.

And if it should be asked, Why did Congress make false impersonation of a federal officer a requirement of both, the first and second clauses of the statute if the very nature of their offenses are so incompatible? our answer is that Congress would have no constitutional power to enact a police law, unless such law related to some governmental function. Congress clearly had the power to prohibit false impersonation of its officers, and it could likewise prohibit such false impersonation for improper purposes. If the statute or either clause thereof had omitted the requirement of such false impersonation, the statute or clause omitting same would be clearly unconstitutional, as an attempted encroachment upon the sovereign right of the state to police its own citizens.

The last paragraph of the opinion of the Court, in which this Court undertook to summarize its analytical comparison between the first and second clauses of the statute, seems to have been the persuasive cause for the decision of the Court. Such paragraph of the opinion reads as follows:

"The first clause of this statute, the only one under consideration here, defines one offense; the second clause defines another. While more than mere deceitful attempt to affect the course of action of another is required under the second clause of the statute, which speaks of an intent to obtain a 'valuable thing', the very absence of these words of limitation in the first portion of the act persuade us that under it, a person may be defrauded although he parts with something of no measurable value at all".

We submit that the analysis is wrong, the comparison is wrong, and the reasoning is wrong. As demonstrated above, the first clause is a defraudment statute, pure and simple, and the words "intent" or "intent to defraud" are no part of the second clause. The first clause denounced any act aimed to defraud another, whether the defraudment was accomplished or not accomplished. There was no need for Congress to recite in the defraudment clause what specific items the defrauder must get or seek to get, because the very use of the word "defraud" was tantamount to a recital in such clause of the specific items of which a person can be defrauded. It meant then, it means now, and since its earliest days it meant causing a person a pecuniary or property loss by artifice or trick. See Hammerschmidt v. United States, supra, 188; United States v. Cohn, 270 U. S. 339, 346. It would have been pure surplusage for Congress to define or break-down the word "defraud" in the statute, because it is a commonplace word, and has a uniformly accepted meaning both in the English language and at common law. It might well be, as a pure academic query, that if the word "defraud" did not have a definite, well-defined meaning, that the first clause of the statute would likely be held invalid for indefiniteness. So, we conclude that the first clause of the statute created within itself a complete and definite offense, requiring no reference to or assistance by other

clauses or statutes to make it completely definite and certain.

This Court seemed to think (and based its decision on such thought) that because the second clause specifically required that the offender demand or obtain "money, paper, document, or other valuable thing", that the omission of such specification of concrete things in the first clause impliedly meant that mere abstract things not so specified, was contemplated by the first clause. That reasoning was based on the false premise that the first and second clauses were inter-related, overlapped and embraced the same offense, and that the test whether an offender fell within the first or second clause of the statute, depended upon the thing he got or sought to get. The Court reached the conclusion that if he demanded or obtained money, paper, document or other valuable thing, he automatically fell within the second clause, and if he got or sought to get a thing not so specified in such second clause, he automatically fell within the first clause of the statute. It is clear that the two clauses set up two separate offenses, the very nature and character of each being entirely different from the other, so that proof of a surreptitious act to defraud wherein the impersonator neither demanded or obtained a thing is not an offense under the second clause, and proof of a demand of money or property in the false pose is not an offense under the first clause (Fasulo v. United States, supra), and that attempt to ally the clauses was improper.

The reason why Congress specifically recited a list of things in the second clause and made no specification at all in the first clause, is obvious. In the first clause Congress made it an offense to do an act "with intent to defraud" another, i. e., cause or attempt to cause such person a pecuniary or property loss (Hammerschmidt v. United States, supra, 188; United States v. Cohn, supra,

346), and the mere use of the word "defraud" in the first clause, because of its uniformly accepted meaning in the English language and at common law, was tantamount to a specific statement that the offender must cause the victim a pecuniary or property loss. The word "defraud" was not used nor referred to nor was it in anywise related to the offense described in the second clause, and consequently in the second clause, this definitive advantage is absent.

In the second clause the impersonator is required to "in such pretended character demand or obtain" WHAT? And unless at that point in the statute Congress specified exactly what was to be demanded or obtained by the impersonator, the description of the offense would be incomplete. And it is no accident that the very things specified in the second clause are the very same things contemplated by the first clause, by merely using the word "defraud" therein. That is why the second clause contained an affirmative specification, and the first clause did not.

If the Court's opinion is permitted to stand, there is presented this absurdity: If an impersonator should seek to elicit information from one person concerning the whereabouts of another, or the time of day, or the location of the court-house, or the condition of the weather, in a surreptitious manner, he is guilty of the first clause, but if he should demand or obtain such information by means of threats or force, he would not be guilty of the first clause (Fasulo v. United States, supra, 628), and because such information is not "money, paper, document or other valuable thing", he would not be guilty of the second clause of statute. The blackmailer or extortionist would be thus freely permitted to ply his nefarious trade.

An additional and really serious absurdity also appears: If an impersonator should arrest a person and detain him of his liberty against his will, or should search such per-

son, or should search his building, he will have violated Title 18 U. S. Code, Sec. 77, now Sec. 77a, a misdemeanor punishable at not more than one year in jail. Yet that impersonator certainly caused

> "the deceived person to follow some course he would not have pursued but for the deceitful conduct"

and, according to the decision and opinion of this Court in this case, would also violate the statute in question, a felony punishable at not more than three years imprisonment. By his one and the same conduct, he will have violated both statutes, one a misdemeanor and the other a felony. Applying the rule of merger of offenses in criminal law, which provides that, where the same criminal act constitutes both a felony and a misdemeanor, there is a merger of the two offenses, the misdemeanor being merged in the felony and the offense becomes punishable as a felony (22 C. J. S. [Criminal Law] Sec. 10, pp. 61, 62; 16 C. J. [Criminal Law] Sec. 10, p. 59; 8 R. C. L. [Criminal Law] Sec. 4a, p. 54; Bellande et al. v. United States, 25 F. [2d] 1, 2 [5 C. C. A.], cert. den. 277 U. S. 607), the violator of the misdemeanor statute (18 U. S. C. 77a) would be punishable under the felony statute (18 U. S. C. 76). And an anomalous situation is presented in those cases where persons have violated the misdemeanor statute (18 U. S. C. 77a) prior to April 19, 1943 (the date of the filing of the opinion in this case) and who now find themselves subject to an increased punishment. Their cry of ex-post-facto law will fall on deaf ears because that is applicable to the lawmakers—Congress—and not to the Courts. If the decision and opinion of this Court is permitted to stand, it will result that Title 18 U. S. Code, Sec. 77a has been judicially amended from a misdemeanor to a felony, and the punishment increased from 1 year to 3 years imprisonment. And all this without so much as a nod from Congress.

The decision of this Court was grounded on the fact that since the second clause spoke of a "valuable thing", the very absence of such words in the first clause meant that a person can be defrauded of an item that is not a "valuable thing." We have demonstrated beyond cavil that the test of which clause an impersonator violates depends on the nature and character of his actions, and not on what he got or sought to get. Since the Court founded its analysis on a false premise, its conclusion was erroneous, and it is respectfully submitted that in the interests of justice, this case be reviewed anew, and appellees granted a rehearing.

(c) Defraud Without Pecuniary or Property Loss.

The opinion of the Court seemed to place undue emphasis on the fact that in United States v. Barnow, 239 U. S. 74, 80, it was said that the purpose of the statute was "to maintain the general good repute and dignity of the (government) service itself", and approvingly cited (Haas v. Henkel, 216 U. S. 462, 480; United States v. Plyler, 222 U. S. 15) cases construing Title 18 U. S. Code, Sec. 88. In the Barnow Case, supra, the constitutionality of the statute was questioned and the statement was made to show that the statute related to a legitimate governmental function, and was within the powers of Congress. Naturally, if the purpose of the statute was to discourage defrauders and extortionists, the statute would be beyond the powers of Congress, and unconstitutional. However, the fact that a case falls within the purpose of the statute does not render it a violation thereof, unless it also falls within the language thereof (Sarlls v. United States, 152 U. S. 570, 575).

We might make the observation that none of the decided cases construing the statute in question should be given too much weight, because they seem not to have quite fully understood the statute. Even the Solicitor General in his

brief and in his argument in this case, insisted on the strength of the Barnow case, supra, that the words "act as such" meant acting in keeping with the false pretense, rather than as this Court rightly held in this case, as acting in the false pose with the intent to defraud. The Courts seem not to have given the statute and the two clauses thereof analytical study, and to rely on such cases as authority, is to lean on a broken staff.

Cases construing Title 18 U. S. Code, Sec. 88 (conspiracy to defraud the United States), are as remote in principle from the case at bar, as is a hog from a goose. Rather, the distinctions made in those cases between the meaning of the word "defraud" in the conspiracy statute (18 U. S. C. 88) and in other federal penal statutes, make them persuasive authority for appellees' position. See Hammerschmidt v. United States, supra, 188; United States v. Cohn, supra, 346.

If it will not be considered presumptuous of us, we wish to say as an aside, that we always felt that the cases which defined the word "defraud" in the conspiracy statute (18 U. S. C. 88) as meaning the interference with or obstruction of a lawful governmental function of the United States by deceitful means, arrived at the right result but through a wrong reason. When the word "defraud" was used by Congress in that statute it meant exactly what the word always meant, i. e., to cause a pecuniary or property loss by deceitful means. There was no occasion for the Court to give it an unnatural meaning. The Court might well have reasoned that there is a vast difference between the status of a person and that of a government, and that since governments exist for the purpose of administering affairs of state, what may properly be a property right of a government, may not be a property right of a person. The United States has a lawful right to insist that its lawful governmental functions be orderly exercised, and such

lawful right is a property right to the United States. It results that to interfere with or obstruct the government's lawful right to the orderly execution of its legitimate function, is an impingement on its property right, productive of a property loss and violative of the statute. Thus, we simply declare what was always the law anyway, without unnecessarily distorting the word "defraud" and give it a so-called secondary meaning.

(d) **Encroachment Upon the Powers of Congress.**

By the Constitution of the United States the exclusive right to legislate is vested in Congress, and the judiciary is prohibited from encroaching thereon. Where the judiciary is required to construe or interpret an Act of Congress, its function is to ascertain the intention of Congress and when ascertained, such intention determines the construction or interpretation of such statute. Courts should meticulously avoid super-imposing its own ideas as to what the law ought to be, for judges are not law-makers. Some few principles of statutory construction have been laid down by the Courts to guide it within the narrow lane that leads to the Congressional intention. Straying beyond such lane usually leads the Court to a mirage, and results in distorting the statute beyond the intended meaning of Congress.

These rules of statutory construction include, among others, the principle that penal statutes are to be construed strictly against the Government and in favor of the accused. It includes too, the salient principle that the Court must not judicially amend or re-write the law as it may deem necessary for the best interests of the nation and the people. And the fact that a state of war exists between this nation and its foes, is no license for the Court to judicially amend or re-write statutory law to befit the exigencies of the times. If the law need amending, Con-

gress has ample power to do so. It is at a time like this, when our spirit of patriotism overflows and influences our every action, that we must be extraordinarily judicious and not allow the foundation of our democratic principles to be sloughed away. We are attracted to the forthright expression appearing in Minor v. Happersett, 88 U. S. 162, 178:

> "If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us".

Appellees feel that this Court has mis-interpreted the word "defraud" in the statute in question, and has accordingly distorted the meaning of the statute beyond the Congressional intention, as to be tantamount to a judicial amendment of the statute.

(e) The Jurisdiction of This Court.

It is our view that this Court assumed and exercised unwarranted jurisdiction in this case. We allude to the principle laid down by this Court in the case of United States v. Borden Co., 308 U. S. 188, 207, where it is said:

> "For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction."

In the case at bar, the District Court sustained the demurrer for the specific reason that:

> "The action of the defendants, in their false and pretended character of Federal Bureau of Investiga-

tion agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not in ny opinion taking upon themselves to act as Federal Bureau of Investigation agents" (R. 6).

It is plain that the demurrer was sustained for the specific reason that the statutory requirement of false impersonation was not met by the language of the indictment which charged the defendants with falsely posing as Federal Bureau of Investigation agents and demanding of Mrs. Silk the whereabouts of Abe Zaidman. That was the particular construction placed by the District Court on the statute, in ruling the demurrer. It would seem that the sole issue before this Court on this appeal was limited to the singular question, Was the action of the defendants in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to the whereabouts of Abe Zaidman, a taking upon themselves to act as Federal Bureau of Investigation agents, within the meaning and purview of the statute? Upon answering that question, whether it be in the affirmative or in the negative, the jurisdiction of this Court under the Criminal Appeals Act, will have been exhausted. The Government's appeal did not open the whole case, nor was the Court at liberty to consider other objections to the indictment, or questions which might arise at the trial, with respect to the merits of the case (United States v. Borden Co., supra, 193, 206).

The statement in this Court's opinion, that the District Court sustained the demurrer on the ground that the conduct of the defendants, "while highly reprehensible, does not come within the terms of the statute" is a mighty strain upon the context of the District Court's opinion. It is true he made that general observation, but he immediately followed it by a specific reason or ground for sustaining the demurrer as to count one, and an altogether

different reason or ground for sustaining the demurrer as to count two. This general observation or statement of the District Court was accordingly modified by the specific reasons or grounds assigned by him in sustaining the demurrer as to each separate count, and this general statement became merged in such specific statements.

It would seem that this Court was unwarranted in assuming and exercising jurisdiction beyond the strict limitations of the Criminal Appeals Act.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment, decision and opinion of this Court in this case is erroneous, and we urge the Court to grant appellees a rehearing.

Respectfully submitted,

HENRY S. JANON,
Attorney for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 629.—October Term, 1942.

The United States of America, Appellant, *vs.* Philip Lepowitch and Marvin Spector, Appellees.	On Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

[April 19, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The defendants are charged with impersonating Federal Bureau of Investigation officers and by that means attempting to elicit information from one person concerning the whereabouts of another. They were indicted under 18 U. S. C. § 76, the first branch of which includes two elements: impersonation of an officer of the government and acting as such with intent to defraud either the United States or any person.[1] The District Judge sustained a demurrer to the indictment, holding that the conduct of the defendants, "while highly reprehensible, does not come within the terms of the statute."[2] He apparently concluded that the count of the indictment under consideration did not, within the meaning of the statute, make sufficient allegations either of impersonation or of acting with intent to defraud. Since the decision below was based on a construction of the statute, the case was properly brought here by the government under the Criminal Appeals Act, 18 U. S. C. § 682, and 28 U. S. C. § 345.

---

[1] "Falsely pretending to be United States officer.—Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

[2] The indictment contained two counts. The second, based on the same acts of the appellees, was rested on the second branch of the statute and the information sought was said to be the "valuable thing" required by the Act. While insisting here that the second count was not subject to the demurrer, the government does not ask for review of the ruling with reference to it.

Government officials are impersonated by any persons who "assume to act in the pretended character." *United States* v. *Barnow*, 239 U. S. 74, 77. The most general allegation of impersonation of a government official, therefore, sufficiently charges this element of the offense. The validity of this portion of the indictment was not contested here.

We hold that the words "intent to defraud" in the context of this statute, do not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.[3] If the statutory language alone had been used, the indictment would have been proof against demurrer under *Lamar* v. *United States*, 241 U. S. 103, 116; *Pieree* v. *United States*, 314 U. S. 306, 307; and this indictment has merely been made more elaborate than that in the *Lamar* case by the addition of a description of the nature of the alleged fraud. In any case, this branch of the statute covers the acquisition of information by impersonation although the information may be wholly valueless to its giver. This result is required by *United States* v. *Barnow*, *supra*, 80, in which we held that the purpose of the statute was "to maintain the general good repute and dignity of the [government] service itself", and cited with approval cases which, interpreting an analogous statute, said: "it is not essential to charge or prove an actual financial or property loss to make a case under the statute." *Haas* v. *Henkel*, 216 U. S. 462, 480; *United States* v. *Plyler*, 222 U. S. 15.

The first clause of this statute, the only one under consideration here, defines one offense; the second clause defines another. While more than mere deceitful attempt to affect the course of action of another is required under the second clause of the statute, which speaks of an intent to obtain a "valuable thing", the very absence of these words of limitation in the first portion of the act persuade us that under it, a person may be defrauded although he parts with something of no measurable value at all.

Reversed.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice ROBERTS believes that the judgment should be affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

---

[3] For a more limited construction of similar words in a different statutory context see United States v. Cohn, 270 U. S. 339.